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Supreme Court, U.S.
JUL 15 1993

No. 93-___

In The

Supreme Court of the United States

October Term, 1993

THE WHEELABRATOR CORPORATION,

Petitioner,

vs.

KENNETH P. BIDLACK, STANLEY DWORECKI, HELEN MARKER, HOWARD W. SNYDER and ZELMA WESCO, on behalf of themselves and all others similarly situated,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Union retirees who enjoyed health insurance benefits under a series of expired collective bargaining agreements sue under the Labor Management Relations Act and the Employee Retirement Income Security Act ("ERISA") claiming a vested contractual right to a guaranteed level of health insurance benefits for life.

1. Are these claims barred, absent explicit language in the expired agreements establishing that the parties to the agreements intended the retirees' benefits to be guaranteed against change?

2. Given that the retiree benefits at issue here are never more than a permissive subject of bargaining, does an employer inherently retain its freedom to modify such benefits unilaterally, absent explicit contract language establishing a contrary intent?

3. Given that ERISA is a comprehensive and reticulated law governing retiree health insurance benefits and requiring all benefit plans to be established and maintained under a written instrument, does an employer who expressly reserves its flexibility to modify benefits in the written instrument retain its freedom to modify them, absent explicit contrary language in a collective bargaining agreement?

4. Given that even the expired collective bargaining agreements in this case never described the actual benefits to be provided, except by reference to pre-existing insurance policies between the employer and the insurance carrier, and given that those same insurance policies expressly recognized the employer's freedom to modify the benefits in question, was the employer free to modify these benefits as a matter of law?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

OPINIONS BELOW 2

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE WRIT 10

I. THERE IS A CONFLICT WITH A DECISION OF THIS COURT 12

A. The Principle of *Litton Financial Printing Div. v. NLRB* Is That Only Contract Language Can Overcome The Presumption That Entitlements Created By A Collective Bargaining Agreement Do Not Survive The Contract's Termination 12

B. The Court Below Failed To Apply *Litton* In Light Of This Court's Opinions Promoting Flexibility Of Action For Employers And Unions Faced With Changing Market Conditions 15

C. The Court Below Failed To Apply *Litton* In Light Of A National Employee Benefits Policy Promoting Flexibility To Modify Employee Welfare Benefits 17

D. The Court Below Failed To Apply *Litton* In Light Of *Pittsburgh Plate Glass* Which Consigns Retiree Health Insurance Benefits To The Class Of Permissive Subjects Of Bargaining 23

TABLE OF CONTENTS – Continued

Page

II. THERE IS A CONFLICT AMONG THE CIRCUITS 25

III. IT IS IMPORTANT FOR THE COURT TO RESOLVE THE CIRCUIT CONFLICT AND LAY DOWN A SINGLE COHERENT RULE FOR CASES OF THIS TYPE 26

CONCLUSION 28

APPENDIX

Appendix A: *Kenneth P. Bidlack, et al. v. Wheelabrator Corporation*, No. 91-2378 (7th Cir. May 18, 1993) A1

Appendix B: *Kenneth P. Bidlack, et al. v. Wheelabrator Corporation*, No. 91-2378 (7th Cir. July 31, 1992) (order setting case for hearing en banc) A43

Appendix C: *Kenneth P. Bidlack, et al. v. The Wheelabrator Corporation*, No. 89 C 360 (RLM) (N.D. Ind. May 15, 1991) (memorandum and order) A45

TABLE OF AUTHORITIES

Page

CASES:

Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985)..... 27

Anderson v. Alpha Portland Industries, Inc., 836 F.2d 1512 (8th Cir. 1988).....18, 25

Arndt, et al. v. The Wheelabrator Corporation, 763 F.Supp. 396 (N.D. Ind. 1991)..... 2

Bidlack, et al. v. Wheelabrator Corporation, 993 F.2d 603 (7th Cir. 1993).....2, 20

Boyer v. Douglas Components Corp., 986 F.2d 999 (6th Cir. 1993).....19, 20

Chemical Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971)..... 23, 24, 25, 26

Consol. Rail v. Railway Labor Execs. Ass'n., 491 U.S. 299 (1989)..... 15

Derrico v. Sheehan Emergency Hospital, 844 F.2d 22 (2d Cir. 1988) 13

Gill v. Moco Thermal Industries, Inc., 981 F.2d 858 (6th Cir. 1992).....19, 20

Hamilton v. Air Jamaica, Ltd., 945 F.2d 74 (3d Cir. 1991), *cert. denied*, 112 S.Ct. 1479 (1992)..... 18

Howe v. Varity Corp., 896 F.2d 1107 (8th Cir. 1990) 18, 19

Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co., 484 U.S. 539 (1988)..... 12

Litton Financial Printing Div. v. NLRB, 501 U.S. ___, 111 S.Ct. 2215, 115 L.Ed. 2d 177 (1991) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Merk v. Jewel Food Stores Div., 945 F.2d 889 (7th Cir. 1991) 16

Metropolitan Life Insurance Co. v. Massachusetts, 471 U.S. 724 (1985) 17

Moore v. Metropolitan Life Ins. Co., 856 F.2d 488 (2d Cir. 1988) 17

Musto v. American General Corp., 861 F.2d 897 (6th Cir. 1988) 18, 19

NLRB v. American Nat'l. Ins. Co., 343 U.S. 395 (1952) 15

NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958) 23

Office and Professional Employees Ins. Trust Fund v. Laborers Funds Administrative Office of Northern California, Inc., 783 F.2d 919 (9th Cir. 1986) 13

Reichelt v. Emhart Corp., 921 F.2d 425 (2d Cir. 1990) 17

Ryan v. Chromalloy American Corp., 877 F.2d 598 (7th Cir. 1989) 18, 19

Senn v. United Dominion Industries, 951 F.2d 806 (7th Cir. 1992), *cert. denied*, 61 U.S.L.W. 3848 (June 21, 1993) 29

Shaw v. Delta Air Lines, 463 U.S. 85 (1983) 17

Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962) 27

Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) 27

UAW v. Yard-Man, Inc., 716 F.2d 1476 (6th Cir. 1983) 10, 23, 25

TABLE OF AUTHORITIES – Continued

Page

STATUTES:

28 U.S.C. § 1254(1) 2, 3

29 U.S.C. §§ 1051, 1081(a) 17

29 U.S.C. § 1102(a) 3, 18

29 U.S.C. § 1132 ..... 3, 8, 21

29 U.S.C. § 185 ..... 3, 8, 13, 20, 27

29 U.S.C. § 158 4

OTHER:

Michael S. Melbinger & Marianne W. Culver, *The Battle of the Rust Belt: Employers' Rights to Modify the Medical Benefits of Retirees*, 5 DePaul Bus. L.J. 139, 145-60 (1992) 26

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PETITION FOR A WRIT OF CERTIORARI

Pursuant to Supreme Court Rules 10 through 14, **THE WHEELABRATOR CORPORATION**[1] ("Wheelabrator")

[1] Pursuant to Rule 29.1, The Wheelabrator Corporation lists the following entities as parents and subsidiaries: Resco Holding Incorporated wholly owns The Wheelabrator Corporation. Wheelabrator Technologies Incorporated, a publicly traded company, wholly owns Resco Holding Incorporated. WMX Technologies Incorporated (formerly Waste Management Incorporated) is a publicly traded company which owns approximately fifty-seven percent (57%) of the common stock of Wheelabrator Technologies Incorporated.

respectfully prays that a writ of certiorari issue to review a judgment of the *en banc* United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the *en banc* court below, dated May 18, 1993, is reported officially as *Bidlack, et al. v. Wheelabrator Corporation*, 993 F.2d 603 (7th Cir. 1993). The opinion of the district court below, dated May 15, 1991, is reported officially as *Arndt, et al. v. The Wheelabrator Corporation*, 763 F.Supp. 396 (N.D. Ind. 1991).

JURISDICTION

i. The court of appeals below had jurisdiction of this case under 28 U.S.C. § 1254(1) and entered its judgment on May 18, 1993.

ii. No party sought rehearing of the court of appeals' decision or judgment entered on May 18, 1993. (The court of appeals, on its own motion under 7th Cir. R. 40(f), ordered rehearing *en banc* on July 31, 1992, after the parties had briefed the case and presented oral argument to a three-judge panel, but before the panel had issued any decision or judgment. This rehearing on the circuit court's motion, which ultimately occurred on December 15, 1992, pre-dated any decision or judgment by the court of appeals and, therefore, had no effect on Petitioner's time limit for filing a petition for a writ of certiorari in this case.)

iii. Not applicable.

iv. This Court's jurisdiction to review the judgment in question is based upon 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Labor Management Relations Act, § 301(a), 29 U.S.C. § 185(a):

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Employee Retirement Income Security Act of 1974, § 402(a), 29 U.S.C. § 1102(a):

> (1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

Employee Retirement Income Security Act of 1974, § 502, 29 U.S.C. § 1132:

(a) Persons empowered to bring a civil action

A civil action may be brought –

(1) by a participant or beneficiary –

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

. . .

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan; . . .

. . .

(e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

National Labor Relations Act, § 8, 29 U.S.C. § 158:

(a) It shall be an unfair labor practice for an employer –

. . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

(b) It shall be an unfair labor practice for a labor organization or its agents –

. . .

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a);

. . .

(d) For purposes of this section, to bargain collectively is the performance of the mutual obligations of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . .

STATEMENT OF THE CASE

Starting in 1962, Wheelabrator and the unions representing its workers in Mishawaka, Indiana negotiated collective bargaining agreements providing retirees with coverage under company-sponsored health insurance plans. By 1980, the level of benefits negotiated for retirees under the agreements matched the benefits provided to Wheelabrator's active workers. Whatever current workers received, Wheelabrator's retirees received.

Wheelabrator closed its Mishawaka plant in 1988 and permanently laid off all workers. Wheelabrator has

employed no active workers in Mishawaka since then. Wheelabrator, nevertheless, has continued to extend health insurance coverage to retirees.

In March 1989, Wheelabrator modified its company-wide health insurance plan and applied its new uniform provisions to all active workers in all locations, as well as to its Mishawaka retirees. The modified plan introduced a 20%/80% co-payment system, with caps for annual co-payments of $1,200 per person or $2,400 per family. It raised the maximum lifetime benefit from $150,000 to $500,000. It eliminated dental, vision and hearing benefits. As applied to retirees, the changes helped some retirees (i.e., those facing major medical expense) while requiring others to pay more for routine care.

This case arose because the Mishawaka retirees want more than the level of benefits Wheelabrator provides to its active employees. The retirees demand guaranteed fixed levels of free health care for life, fixed at the peak level of benefits provided while the Mishawaka plant was in operation. While they do not protest the institution of higher maximum benefits (an improvement shared by active workers at all Wheelabrator locations), they want relief from the co-payments and they want reimbursement for vision, dental and hearing expenses (benefits not enjoyed by Wheelabrator's active workers). In essence, the retirees contend that they are entitled to keep the best features of health insurance Wheelabrator ever provided and escape downward adjustments in any specific feature.

Notably, the collective bargaining agreements underlying the retirees' claims do not describe (and never

described) any of the specific benefits the retirees now claim to be guaranteed against change. Through all the years of collective bargaining, the agreements only described benefits by reference to documents lying outside the agreements themselves. With respect to hospital and surgical benefits, for example, each agreement in place from 1965 through 1988 provided only that, upon attainment of age sixty-five (65), covered retirees would receive supplemental health insurance benefits "which, combined with Medicare, will provide a level of benefits equal to the Wheelabrator Blue Cross/Blue Shield plan for active and retired employees sixty-five (65) years of age or older." That is, Mishawaka retirees' benefits would be brought in line with those already provided to others under a pre-existing health insurance plan. Wheelabrator accomplished this by placing retirees under the pre-existing plan. The collective bargaining agreements never provided any description or explanation of the Blue Cross/Blue Shield (BCBS) benefits which Wheelabrator was to provide, however. These could only be divined by reference to Wheelabrator's pre-existing BCBS insurance policies. The same is true for each category of benefits extended to retirees through collective bargaining after 1965. The collective bargaining agreements simply described the extension of benefits to retirees by category, and then only by reference to BCBS insurance documents outside the Wheelabrator/union collective bargaining agreements. In each case, Wheelabrator then contracted with BCBS to include the retirees as participants under the existing insurance policies.

Each of the referenced insurance policies have always included explicit language recognizing Wheelabrator's

right to modify or even to terminate its health insurance plans. That is, the extension of coverage to retirees in each event was the extension of coverage under an insurance policy which preserved Wheelabrator's flexibility to modify benefits. Nothing in any of the collective bargaining agreements stated anything to the contrary. Specifically, nothing in any collective bargaining agreement stated that any particular benefit levels would be "vested" or would be provided "for life." What is more, nothing in the collective bargaining agreements even implied an intent to guarantee *particular benefit levels* for the Mishawaka retirees in this case.

By way of contrast, when Wheelabrator and union negotiators wanted to guarantee retiree health insurance benefits for life, they knew how to do it and did it with express vesting language in their collective bargaining agreement. Thus, in 1985, they negotiated an explicit vesting schedule for workers who would retire on or after January 1, 1986 (a category of retirees not involved in this case) and agreed that "This coverage will be provided to the retiree and spouse at no cost for life." No such language was ever negotiated on behalf of those already retired by 1985 (i.e., the retirees at issue in this case).

When Wheelabrator modified its health insurance plan in March 1989, the affected (pre-1986) retirees brought a class action to reverse and enjoin the modification. The retirees sued under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, for alleged breach of the expired collective bargaining agreements and under § 502 of ERISA, 29 U.S.C. § 1132, for alleged breach of obligations under an employee welfare benefit plan.

These two statutes conferred jurisdiction on the district court.

Wheelabrator moved to dismiss and for summary judgment on June 25, 1990, contending that an expired collective bargaining agreement cannot provide a basis for an action in contract, absent a clear written expression of the parties' contrary intent, and showing that the written benefit plans explicitly preserved Wheelabrator's flexibility to modify benefits. The retirees filed a cross-motion for summary judgment. On May 15, 1991, the district court granted Wheelabrator's motion for summary judgment and denied the retirees' cross-motion for summary judgment.

The retirees filed their notice of appeal in the district court on June 13, 1991. After briefing, the parties' counsel presented oral argument to a three-judge panel of the court of appeals on February 27, 1992. On July 31, 1992, the full court of appeals, on its own motion under 7th Cir. R. 40(f), ordered rehearing *en banc*. After supplemental briefing, the parties' counsel presented oral argument to the *en banc* court on December 15, 1992.

On May 18, 1993, the *en banc* court issued its judgment, deciding six-to-four to reverse summary judgment for Wheelabrator and remand the case for trial. No single opinion spoke for the court. One opinion, by Judges Posner, Flaum and Kanne, propounded what a concurring opinion labeled a " 'weak' no-vest rule" and held that trial was necessary to resolve perceived ambiguity in the meaning of the contract phrase "after they attain sixty-five (65) years of age" and the phrase "shall be continued for the spouse after the death of the retiree."

An opinion by Judges Cudahy, Ripple and Rovner, concurring *only in the judgment*, propounded a " 'weak' vest rule" (essentially the rule announced in *UAW v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983), and recognizing a presumption in favor of vesting), but agreed to reverse and remand for trial. Judge Easterbrook, joined by Chief Judge Bauer and Judges Coffey and Manion, dissented. According to the dissenters, Wheelabrator's summary judgment should be affirmed because, among other reasons, there was no explicit (or ambiguous) language in the collective bargaining agreements indicating any intent that specific benefits were meant to be guaranteed against change.

On June 4, 1993, Wheelabrator moved to stay the court of appeals' mandate pending this petition for a writ of certiorari. Wheelabrator amended its motion to stay the mandate on June 15, 1993. On June 15, 1993, the court of appeals stayed its mandate until July 15, 1993.

REASONS FOR GRANTING THE WRIT

The court of appeals' judgment below conflicts in principle with *Litton Financial Printing Div. v. NLRB*, 501 U.S. ___, 111 S.Ct. 2215, 115 L.Ed. 2d 177 (1991), which recognizes only limited circumstances in which collectively bargained benefits will be found to survive termination of the agreement creating them. When the rule of *Litton* is applied to the issue of collectively bargained retiree health insurance benefits, it requires explicit terms to overcome the presumption that the benefits do not survive contract termination. National labor relations

policy favors flexibility to deal with changing market conditions. This policy is especially strong in the case of a permissive subject of bargaining which, by law, is always open to unilateral change absent a live agreement to the contrary. Further, national employee benefits policy, as expressed in ERISA, favors flexibility to modify employee welfare benefits (such as retiree health insurance benefits) in response to unpredictable cost increases. This policy is especially strong when the employer has expressly reserved its flexibility in formal benefit plan documents. The court of appeals' decision and judgment below conflicts with *Litton* because it looks to extrinsic evidence to answer the question of the contracting parties' subjective intent when there is no explicit contractual language indicating any intent to vest benefits.

Further, the court of appeals' decision below reveals a serious conflict among the circuits on how to approach questions of this kind. The court's three separate opinions, none of which gained the support of a majority of judges[2], vouch for three separate approaches. These divergent views mirror the fractured condition of the law in this field.

It is important that the circuit conflict be resolved and that it be resolved on a basis conforming with *Litton*'s rule that only contract language can overcome the presumption against survival of benefits. Many cases have

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[2] Only the dissenting opinion of Judge Easterbrook enjoyed the support of as many as four judges. The concurring opinion of Judges Cudahy, Ripple and Rovner joined only in the judgment proposed by Judge Posner, i.e., to reverse and remand to the district court.

arisen, and continue to arise, on this issue. As long as different circuits apply different principles of analysis to similar or identical facts, the federal labor policy and the federal employee benefit policy in favor of uniform interpretation and application of agreements and plans will not be realized. The Court should adopt the approach of the dissenting opinion below. Only the dissent is consistent with the principles of *Litton*, by requiring explicit contract language to overcome the presumption against contractually established entitlements surviving contract expiration.

I. THERE IS A CONFLICT WITH A DECISION OF THIS COURT.

A. The Principle of *Litton Financial Printing Div. v. NLRB* Is That Only Contract Language Can Overcome The Presumption That Entitlements Created By A Collective Bargaining Agreement Do Not Survive The Contract's Termination.

Black letter law holds that a plaintiff seeking to enforce duties arising under an expired collective bargaining agreement must prove affirmatively that the contracting parties intended this result. This Court has recognized this principle twice in the last five years. In *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539 (1988), the Court held that a health and welfare trust fund cannot sue under ERISA to enforce a contractually established employer duty to make contributions once the underlying collective bargaining agreement has expired. In *Litton*, the Court stated the principle as follows: "As with the obligation to

make pension contributions in Advanced Lightweight Concrete Co., other contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement." *Litton*, 115 L.Ed. 2d at 198. Amplifying the point, the Court wrote:

> *[A]n expired contract has by its own terms released all parties from their respective contractual obligations*, except obligations already fixed under the contract but as yet unsatisfied. Although after expiration most terms and conditions of employment are not subject to unilateral change, in order to protect the statutory right to bargain, *those terms and conditions no longer have force by virtue of the contract.*

Id. at 197. The Court cited with approval *Office and Professional Employees Ins. Trust Fund v. Laborers Funds Administrative Office of Northern California, Inc.*, 783 F.2d 919, 922 (9th Cir. 1986) ("An expired [collective bargaining agreement] . . . is no longer a 'legally enforceable document' "), and compared *Derrico v. Sheehan Emergency Hospital*, 844 F.2d 22, 25-27 (2d Cir. 1988) (§ 301 of LMRA does not even provide federal court jurisdiction where a bargaining agreement has expired).

Critically, this Court has also described what it takes to overcome the presumption that entitlements arising through collective bargaining expire with the agreements creating them. According to *Litton*:

> Exceptions are determined *by contract interpretation*. Rights which accrued or vested under the agreement will, as a general rule, survive termination of the agreement. And, of course, if a collective bargaining agreement provides *in explicit terms* that certain benefits continue after

> the agreement's expiration, disputes as to such continuing benefits may be found to arise under the agreement. . . .

Id. at 198 (emphasis added).

There is only one reasonable reading of this passage from *Litton*. Contract *language* and the interpretation of that *language* governs the question of whether entitlements survive expiration. As is shown below, health insurance benefits are, by their nature, *not* ordinarily vested or accrued. On the contrary, under ERISA, Congress intentionally decided not to vest them. Thus, under the principles of *Litton*, explicit language is always required if such benefits are to outlast the contract which created them.

According to the retirees, and according to the opinion of Judges Cudahy, Ripple and Rovner, below, the quoted language from *Litton* should be read so expansively as to mean that contractually established benefits may survive the agreement's expiration in a number of ways, including looking past the actual language of the agreement to determine the parties' subjective and unwritten intent. According to the opinion of Judges Posner, Flaum and Kanne, *Litton* should be read expansively to mean that if there is language in the expired contract that might be deemed ambiguous on the question of whether *any* entitlements were meant to survive expiration, then it is appropriate to look past the other language of the agreement (and the language of the written plan instruments) to determine the parties' subjective and unwritten intent on the issue of precisely *which* entitlements were meant to survive. For reasons expressed below, both of these approaches are in conflict with the

principles of *Litton*. This conflict is particularly clear here where strong national policies favor flexibility to modify benefits of this type, absent clear written agreements to the contrary.

The decision below is in conflict with *Litton* because it rushes to receive extrinsic evidence of the parties' subjective state of mind on the issue of vesting. *Litton* says this question is to be answered by contract language. And in this case, there is no explicit contract language displaying an intent to vest.

B. The Court Below Failed To Apply *Litton* In Light Of This Court's Opinions Promoting Flexibility Of Action For Employers And Unions Faced With Changing Market Conditions.

It is an established doctrine of federal labor policy that federal courts should adopt rules of contract construction designed to promote flexibility of action in labor relations. *See Consol. Rail v. Railway Labor Execs. Ass'n.*, 491 U.S. 299, 309 (1989) (rejecting a construction of a labor agreement that would have denied management "the power to respond flexibly to changing circumstances"); *see also NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 408 (1952) (rejecting a construction that would have denied management the power to bargain for "more flexible treatment" and "disrupt[ed] collective bargaining practices").

As Judge Easterbrook has articulated this principle:

> Labor agreements govern the ongoing relations among thousands of persons and affect matters

> not so easy to specify. Rigidity backfires. Competitive conditions and technology change. Labor relations must change, too, even over so short a period as three years. Failure to adjust to new developments means failure in product markets. . . . Greater flexibility promotes responses in the marketplace that may benefit both sides.

Merk v. Jewel Food Stores Div., 945 F.2d 889, 901 (7th Cir. 1991) (Easterbrook, J., dissenting).

The doctrine promoting flexibility of action in collective bargaining is especially important in an area such as retiree health insurance benefits where Congress itself has noted that costs are uncertain and inherently unpredictable. See p. 17, below. Employers must be able to make changes if they are to be able to adjust to the changing economics of providing health care. A court that strains to find a triable question over vesting of retiree health insurance benefits upon retirement, despite a void of contract language indicating this intent, subjects the parties to risk of a labor relations obligation extending for decades that neither employers acting alone *nor employers and unions acting jointly*[3] may alter, regardless of

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[3] It is important to note that the retirees contend that they are presently entitled, *and have always been entitled* since their retirements, to guaranteed, fixed levels of benefits at no cost for life. If this is so, then by definition not even Wheelabrator *acting in concert with the retirees' former union* could have negotiated downward adjustments. One can imagine the surprise of both parties at the bargaining table in, say, 1980, if they had been informed by a retiree spokesman that by agreeing to extend health insurance coverage to retirees for the term of the previous agreement (or even into the foreseeable future) the parties

circumstances. Conversely, a rule recognizing that contractually created benefits are presumed not to outlast the agreement creating them, absent explicit language to the contrary, assures that employers' and unions' hands will not be tied unless they have made that intent very clear.

C. The Court Below Failed To Apply *Litton* In Light Of A National Employee Benefits Policy Promoting Flexibility To Modify Employee Welfare Benefits.

Both the express language of ERISA and the law interpreting it make clear that, contrary to the rules for pension benefits, ERISA does not require vesting of health insurance benefits. 29 U.S.C. §§ 1051, 1081(a); *Shaw v. Delta Air Lines*, 463 U.S. 85, 91 (1983); *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 732 (1985). Congress intentionally rejected statutory or automatic vesting of welfare benefits because it recognized the need of employers responsible for purchasing these benefits to have flexibility in modifying them, among other reasons, because the costs of such benefits are subject to fluctuating and unpredictable variables. *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488, 492 (3d Cir. 1988) ("[M]edical insurance must take account of inflation, and increases in costs of treatment independent of inflation. These unstable variables prevent accurate predictions of future needs and costs.") Congress "left the employer with considerable flexibility with respect to welfare plans." *Reichelt v. Emhart Corp.*, 921 F.2d 425 (2d Cir. 1990).

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had forever surrendered their joint power to modify benefits under the plan.

ERISA permits parties to a welfare benefit plan to provide by written agreement that these benefits are subject to vesting requirements, *see Ryan v. Chromalloy American Corp.*, 877 F.2d 598 (7th Cir. 1989), but absent such an agreement by the parties to vest these benefits, they do not vest. *Howe v. Varity Corp.*, 896 F.2d 1107, 1009 (8th Cir. 1990), *citing Anderson v. Alpha Portland Industries, Inc.*, 836 F.2d 1512, 1516-17 (8th Cir. 1988).

According to ERISA § 402(a), 29 U.S.C. § 1102(a), "Every employee benefit plan shall be established and maintained pursuant to a written instrument." The resulting principle of law under ERISA requiring adherence to the written terms of this instrument is a strict one. Thus, in *Hamilton v. Air Jamaica, Ltd.*, 945 F.2d 74 (2d Cir. 1991), *cert. denied*, 112 S.Ct. 1479 (1992), the court of appeals held that a written plan document governed an employee's right to benefits even though the benefits at issue were only referenced in the document by mistake (due to printer's error). As the Court explained, "Congress in passing ERISA did not intend that participants in employee benefit plans should be left to the uncertainty of oral communications in finding out precisely what rights they were given under their plan." *Id.*, 945 F.2d at 77.

In *Musto v. American General Corp.*, 861 F.2d 897 (6th Cir. 1988), retirees challenged a change in their health insurance benefits and argued that they had a vested contractual right to veto any change. Extrinsic evidence included employer promises not to change benefits. The court of appeals reversed a judgment in the retirees' favor, stating:

> [W]e are quite certain that Congress, in passing ERISA, did not intend that participants in employee benefit plans should be left to the uncertainties of oral communications in finding out precisely what rights they were given under their plan. That is why ERISA makes it mandatory that "every" plan be established and maintained under "a written instrument."
>
> . . . . If the terms of these often complex plans could be made to depend upon evidence as to oral statements that may not have been worded very precisely in the first place, that may have been made years earlier, and that cannot be proved except through the testimony of lay witnesses whose memories will seldom be infallible and who, being human, may have tended to hear what they wanted to hear, the degree of certainty that Congress sought to provide for them would be utterly impossible to obtain.

Id. at 909-910 (footnote omitted).

As shown, ERISA does not require vesting of welfare benefits, absent a written agreement to the contrary. Where the employer specifically reserves its flexibility to modify welfare benefits by expressly stating this flexibility in the written instrument of the plan, however, it is perfectly clear that the benefits are not vested. *Ryan v. Chromalloy American Corp.*, 877 F.2d at 604; *Boyer v. Douglas Components Corp.*, 986 F.2d 999, 1005 (6th Cir. 1993); *Gill v. Moco Thermal Industries, Inc.*, 981 F.2d 858 (6th Cir. 1992); *Howe v. Varity Corp.*, 896 F.2d at 1109.

In the instant case, Wheelabrator expressly reserved its flexibility to modify benefits in each of the BCBS

insurance policies. *Bidlack*, Appendix at A29 (Easterbrook, J., dissenting). As a result, if the retirees had brought this case solely under ERISA, whether it was in the Seventh Circuit or either of the surrounding circuits, suing to enforce alleged rights under their plan, there would be no question about the outcome: Wheelabrator would unquestionably be found to have the right to modify benefits as it did.

Despite this, the two concurring opinions below utterly ignore the import of Wheelabrator's express reservation of its right to modify benefits in the BCBS plans. Judges Cudahy, Ripple and Rovner do not mention it. Judges Posner, Flaum and Kanne dismiss it out of hand. *Bidlack*, Appendix at A5 ("The union was not a party to the contract between Wheelabrator and its insurer, and anyway the issue is not the obligations of Blue Cross-Blue Shield to Wheelabrator but Wheelabrator's obligations to its retired employees"). Only Judge Easterbrook's dissenting opinion pays due heed to Wheelabrator's express reservation of flexibility in the insurance plans, noting that in the only documents in this case which even purport to describe the actual benefits to be provided (i.e., the BCBS insurance policies), Wheelabrator used language which tracks precisely the language in the agreements in *Boyer, supra*, and *Gill, supra*, two cases holding that the insurance policies are the "plan" within the meaning of ERISA and that the language of these plans "outranks oral promises." Appendix at A29.

It is unreasonable to apply *Litton*'s § 301 analysis to a case like the instant one as though ERISA and the principles developed under it never existed. Yet, that is precisely what six of the ten judges below did. *See* Appendix

at A2. ("The briefs devote much space to the federal pension law [ERISA] as well, which does in fact furnish an alternative jurisdictional basis to the Taft-Hartley Act for maintaining this suit in federal court, 29 U.S.C. § 1132(e)(1), but which has little bearing on the issues in contention.")

The result of this error of analysis is to make the benefits of union retirees less susceptible to change than those of other retirees *under the same benefit plan*, not because of any explicit collective bargaining agreement language indicating an agreement to vest benefits for union retirees, but merely because the retirees' benefits arose in a context of collective bargaining. This creates an unwarranted and intolerable distinction in rights based upon mere status.

The law of nearly every circuit addressing the question under ERISA holds that retiree health insurance benefits arising under a plan document which expressly preserves the employer's flexibility to modify benefits are subject to unilateral modification. (*See* Appendix at A34-35, 42, Easterbrook, J., dissenting.) In the present case, union and non-union retirees coexist as participants under the identical health insurance plan. The expired collective bargaining agreements, even during their terms, did nothing more than extend *coverage* under the plan to union retirees and their surviving spouses. The chief error of the two concurring opinions below is their holding that negotiated language saying only that union retirees and their spouses will be *covered* by the employer's policies (i.e., the same policies covering the employer's non-union retirees) may be interpreted as expressing an intent to give union retirees a vested right

to specific benefits which the other retiree participants *under the same plan* clearly do not have.

When due consideration is given to ERISA principles, taking into account Wheelabrator's express ERISA reservation of flexibility to modify benefits, it becomes clear that the *Litton* presumption against entitlements surviving in a case like this is a very strong one. In such a case, involving an ERISA-based preservation of flexibility to modify benefits, nothing short of "explicit language" in the collective bargaining agreement of an intent to vest is sufficient to override the presumption against vesting and place union retirees on a higher plane of vesting than other retirees who participate in the same plan.

Of the ten judges involved in the decision below, only three (Judges Posner, Flaum and Kanne) even identified language in the collective bargaining agreement which they believed was sufficiently ambiguous on the tangential issue of continuing *coverage* to call for fact-finding on that issue. (The four dissenting judges expressly found no such ambiguous language. The three concurring judges did not address the issue.) Even Judges Posner, Flaum and Kanne concede, however, that the identified language on coverage is merely open to varied interpretations. Wheelabrator contends that if they had considered the ERISA principles in this case, as they should have, and had taken into account Wheelabrator's express reservation of flexibility in the controlling plan documents, then the language they found to be ambiguous on the issue of coverage could never reasonably have justified a trial on the issue of whether the parties intended to guarantee specific benefit levels.

D. The Court Below Failed To Apply *Litton* In Light Of *Pittsburgh Plate Glass* Which Consigns Retiree Health Insurance Benefits To The Class Of Permissive Subjects Of Bargaining.

In *Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), the Court recognized that the interests of active workers and retirees will not always be in harmony, thus, the Court held that bargaining over benefits for already retired workers is not mandatory. Retiree benefits are merely a permissive subject of bargaining. Since then, courts have recognized that retiree health insurance benefits in particular are a permissive subject of bargaining. *See, e.g., UAW v. Yard-Man, Inc.*, 716 F.2d at 142.

The significance of the permissive/mandatory distinction for this case is great. As the name indicates, *permissive* subjects of bargaining *may* be a subject of collective bargaining if both parties consent. *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958). But neither party can insist on bargaining over a permissive subject without committing an actionable unfair labor practice. *Id.* at 349. Further, absent a binding contractual commitment to the contrary, an employer may unilaterally modify its position on a permissive subject of bargaining. *Pittsburgh Plate Glass*, 404 U.S. at 187. A permissive subject of bargaining does not lose its permissive character under labor law by becoming the subject of a collective bargaining agreement. *Id.* Even during the term of an agreement, the covered subject is still permissive, although it may be enforceable under contract law. *Id.* at 187-88. Once a contract covering the subject has expired,

neither party has any duty even to bargain about a permissive subject even though several past contracts dealt with the subject. *Id.*

All of this carries heavy implications in a case like the present one. The uniform federal labor law governing collective bargaining over retiree health insurance benefits, per *Pittsburgh Plate Glass*, establishes that retiree health insurance benefits are open to unilateral modification by employers absent a current contractual commitment to the contrary. That same federal labor law holds that when there is no longer a current contract prohibiting unilateral changes, then there is no basis in the law for limiting those changes.[4] This law forms the legal backdrop for the parties' collective bargaining negotiations involving retiree health insurance benefits at Mishawaka.

The principles of *Pittsburgh Plate Glass*, as stated above, must not be ignored in applying the principles of *Litton* to a case like this one. *Litton* says collectively bargained entitlements do not survive contract expiration in the normal course absent *language* to the contrary. *Litton* allows that vested or accrued benefits may survive, but still ties the question to interpretation of contract language. When federal labor law policy, as stated in *Pittsburgh Plate Glass*, says the entitlements at issue are subject to unilateral change in the normal course, then the principles of *Litton* must require explicit language to

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[4] This coincides precisely with the formulation under ERISA. Employers are free to modify retiree health insurance benefits absent an enforceable agreement to the contrary. *See* pp. 18-19, above.

force a contrary result. Otherwise, the expectations of parties to the collective bargaining agreement, founded upon the law of *Pittsburgh Plate Glass*, that permissive subjects of bargaining will be subject to unilateral change when contracts expire could too easily be defeated.

The court of appeals, below, failed to read and apply *Litton* with due regard for overriding principles of federal labor and employee benefits law, giving employers (and unions) the flexibility to modify their positions with respect to retiree health insurance benefits absent clear agreements to the contrary. In a case like this one, the principles of *Litton* require explicit vesting language before entitlements established in collective bargaining may be found to survive contract expiration.

II. THERE IS A CONFLICT AMONG THE CIRCUITS.

The conflict apparent in the approaches of the three opinions below models the existing conflict among the circuits. Judge Easterbrook's dissenting opinion states the conflict and the resulting problem succinctly:

> Uncertainty now reigns. In at least one circuit health and welfare benefits mentioned in collective bargaining agreements presumptively vest on retirement. *UAW v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983). In this circuit such benefits presumptively do not vest, but the presumption is weak. Other circuits have still other formulae. E.g., *Anderson v. Alpha Portland Industries, Inc.*, 836 F.2d 1512 (8th Cir. 1988). And in most circuits employers retain complete freedom to alter retirees' health benefits in the absence of collective bargaining agreements, see cases cited at

> slip op. 28 – although after *Pittsburgh Plate Glass*, it is impossible to understand why the existence of a collective bargaining agreement augments the force of the employer's promise. Employers with national operations are subject to multiple and inconsistent rules, compounded by the uncertainty inherent in sending big-stakes questions to the constantly-changing panels that are juries. See Michael S. Melbinger & Marianne W. Culver, *The Battle of the Rust Belt: Employers' Rights to Modify the Medical Benefits of Retirees*, 5 DePaul Bus. L.J. 139, 145-60 (1992) (cataloging six distinct approaches). Uncertainty never promotes industry. Risk is an uncompensated, and substantial, cost of operations, and in this respect the fortunes of labor, capital, and consumers – that is, of us all – are linked.

Appendix at A41-42.

III. IT IS IMPORTANT FOR THE COURT TO RESOLVE THE CIRCUIT CONFLICT AND LAY DOWN A SINGLE COHERENT RULE FOR CASES OF THIS TYPE.

The question of when and under what circumstances collectively bargained retiree health insurance benefits survive the expiration of the agreements creating them has arisen in almost every circuit. The variant answers provided by the circuit courts, like the variant answers provided by the three opinions of the *en banc* court below, leave the field in a state of confusion and unpredictability. This conflict among the circuits, as well as the conflict within circuits, is especially troublesome given the context of collective bargaining in which it arises.

National companies and national unions negotiate collective bargaining agreements covering employees and retirees across state and circuit boundaries. National unions often negotiate standard language in separate agreements with separate employers in widely divided parts of the country. Much the same is true with respect to standardized health insurance plans administered by national health insurance carriers. The conflict of circuits described above has created a situation where national companies operating in many locations, not to mention different employers providing health insurance benefits under identical or similar contract or plan language, may be found to have committed themselves to providing fixed lifetime benefits to retirees *or not* depending solely upon the location where the question is tested. This situation begs for forum shopping by anyone caught up in a dispute like the present one.

This is a particularly intolerable state of uncertainty in an area of law which demands nationwide uniformity of results. Section 301 of the LMRA, 29 U.S.C. § 185, not only provides federal courts with jurisdiction to resolve disputes arising out of collective bargaining, but it is a "congressional mandate to federal courts to fashion a body of federal common law to be used to address disputes arising out of labor contracts." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 209 (1985); *accord Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957). "[I]n enacting § 301 Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules." *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 104 (1962). "The interests in interpretive uniformity and predictability that

require that labor-contract disputes be resolved by reference to federal law also require that the meaning given a contract phrase or term be subject to uniform federal interpretations."

A similar policy underlies ERISA, the primary federal law regulating administration and delivery of employer-provided welfare benefits (including retiree health insurance benefits like those at issue here). And as with the federal labor law, ERISA is an expression of *national* employee benefits policy. For the same reasons that federal labor law demands uniformity of results under a given contract phrase or term, federal employee benefits policy demands uniformity of results under a given benefit plan phrase or term. When these paramount federal policies converge on the issue of interpretation and application of a collectively bargained retiree health insurance provision, they command resolution of circuit conflicts.

CONCLUSION

This case presents an appropriate vehicle for resolving the uncertainty that now exists. The record on appeal includes the features of the typical case: (1) an expired collective bargaining agreement which, while it was effective, extended health insurance benefits to retirees but which did not express an intention to do so after expiration; and (2) an underlying employee welfare benefit plan in the form of insurance policies expressly reserving the

employer's flexibility to modify benefits.[5] The recurring policy issues inherently found in the interplay between federal labor law and federal employee benefit law are acutely present here. The relevant facts and policy considerations have been addressed and debated by the *en banc* court below. The questions presented seek proper legal standards for cases of this type. These are questions of law and are all ripe for decision.

For all the reasons stated above, Wheelabrator respectfully urges the Court to issue the writ and resolve the demonstrated conflict.

Respectfully submitted,

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[5] This distinguishes the petition in the present case from that in *Senn v. United Dominion Industries*, 951 F.2d 806 (7th Cir. 1992), *cert. denied*, 61 U.S.L.W. 3848 (June 21, 1993), where no question was raised about the impact of express reservations of an employer's right to modify benefits in ERISA plan documents.

APPENDIX A

In the
United States Court of Appeals
for the Seventh Circuit

No. 91-2378
KENNETH P. BIDLACK, *et al.*,

Plaintiffs-Appellants,

v.

WHEELABRATOR CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Indiana, South Bend Division.
No. 89 C 360-**Robert L. Miller, Jr.**, *Judge.*

ARGUED FEBRUARY 27, 1992
REARGUED EN BANC DECEMBER 15, 1992 –
DECIDED MAY 18, 1993

Before BAUER, *Chief Judge*, and CUDAHY, POSNER, COFFEY, FLAUM, EASTERBROOK, RIPPLE, MANION, KANNE, and ROVNER, *Circuit Judges.*

POSNER, *Circuit Judge*. This is a class action on behalf of retired employees of the Wheelabrator Corporation. They claim that collective bargaining agreements between Wheelabrator and the union that represented employees at Wheelabrator's plant in Mishawaka, Indiana conferred upon the plant's retired employees workers lifetime rights to certain health benefits – hence rights that survived the expiration in 1988 of the last collective bargaining agreement between the company and the union applicable to the Mishawaka plant, which Wheelabrator closed that year. The plaintiffs base the suit primarily on section 301 of the Taft-Hartley Act, 29 U.S.C. § 185, which creates a private right of action to enforce collective bargaining agreements. The briefs devote much space to the federal pension law (Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 *et seq.*) as well, which does in fact furnish an alternative jurisdictional basis to the Taft-Hartley Act for maintaining this suit in federal court, 29 U.S.C. § 1132(e)(1), but which has little bearing on the issues in contention. ERISA does not require the vesting of health or other "welfare" benefits, as it does pension benefits, *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91 (1983); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 732 (1985); *Ryan v. Chromalloy American Corp.*, 877 F.2d 598, 603 (7th Cir. 1989), but equally it does not forbid their vesting by a written contract, *id.*, which could be part of a collective bargaining agreement. *International Union, United Auto Workers v. Yard-Man, Inc.*, 716 F.2d 1476, 1479-80 (6th Cir. 1983); *United Steelworkers v. Fort Pitt Steel Casting*, 598 F.2d 1273 (3d Cir. 1979); cf. *In re White Farm Equipment Co.*, 788 F.2d 1186, 1193 (6th Cir. 1986).

The district court granted summary judgment for the company, and dismissed the suit, because "an examination of the formal plan documents and the collective bargaining agreements reveals no intention on Wheelabrator's part to provide pre-1986 retirees the same level of benefits at no cost for life" and he believed that the requisite intention could not be proved by extrinsic evidence, that is, evidence outside the written contracts themselves. The plaintiffs appealed and the appeal was argued, as is customary, before a three-judge panel. Before the panel issued its decision, the full court, in accordance with Circuit Rule 40(f), decided to hear the case en banc in order to reexamine an earlier decision of the court, *Senn v. United Dominion Industries, Inc.*, 951 F.2d 806 (7th Cir. 1992). Judge Cummings, a member of the original panel, has recused himself from further consideration of the case because of a transaction by Wheelabrator that occurred after the en banc vote.

The main question briefed and argued by the parties is whether the absence from the collective bargaining agreements of any provision that explicitly vests the health benefits of retired employees defeats those employees' claims even though some contractual language and a great deal of "extrinsic" evidence – evidence apart from the language of the agreements – suggest that the parties may have intended to confer vested rights on the retired employees, that is, rights that would outlast the expiration of the last collective bargaining agreement. If the answer is "yes" – the inexplicitness of the agreements is an insuperable obstacle to the suit – the district judge was right to grant summary judgment for the company. A second question, presented by Wheelabrator, is

whether, even if the retired employees had vested rights, it is plain from the terms of the collective bargaining agreements that their rights were no greater than those of the active employees. For Wheelabrator did not cut off the retired employees of the Mishawaka plant when the last collective bargaining agreement applicable to employees at that plant expired and the plant was closed. It is continuing to pay their health benefits at the same level and cost as the health benefits that it pays the active employees at its other plants.

Beginning with the collective bargaining agreement signed in 1965, every agreement between the company and the union in this case up to and including the last one applicable to the Mishawaka plant, which was signed in 1985, contained a section which provided both that "those employees who have retired since September 22, 1959, will have the full cost of their Blue Cross-Blue Shield coverage paid by the Company after they attain sixty-five (65) years of age" and that they would be entitled to certain supplemental health benefits, also paid for by the company, "which, combined with Medicare, will provide a level of benefits equal to the Wheelabrator Blue Cross-Blue Shield plan for active and retired employees sixty-five (65) years of age or over" and which "shall be continued for the spouse after the death of the retiree." We have quoted from the final collective bargaining agreement but the corresponding language of the earlier agreements is materially identical. There are, however, other differences between the agreements. In particular, the final agreement contains a provision not found in the earlier ones. It is the section following the one from which we quoted and it provides explicitly for the "vesting" of certain

health benefits for employees who retire after the new agreement takes effect, that is, after January 1, 1986. The immediately preceding section, the one at issue in this case, governs the rights of employees who retired earlier; it is only employees in this group, that is, employees who retired on or before January 1, 1986, who are members of the plaintiff class.

Another contractual provision to which the parties have referred us is found in the contract between Wheelabrator and Blue Cross-Blue Shield for the purchase by the former of health insurance sold by the latter. The provision in question authorizes the company to change the level of benefits insured by Blue Cross-Blue Shield. We do not think it has much relevance to the main issue in this case, that of the duration of benefits. The union was not a party to the contract between Wheelabrator and its insurer, and anyway the issue is not the obligations of Blue Cross-Blue Shield to Wheelabrator but Wheelabrator's obligations to its retired employees. Those obligations are defined by the collective bargaining agreements, not by the insurance contract. The latter however may be relevant to the dispute over the level of benefits to which the retired employees are entitled, assuming that they are entitled to any benefits at all after the last collective bargaining agreement in which these employees were mentioned expired.

There is evidence that, if believed (an important qualification, for there has been no trial), suggests that the language we quoted from the collective bargaining agreements was intended to confer lifetime benefits on employees who retired before 1986. For twenty years – from 1968 to 1988 – Wheelabrator issued a form to each

newly retired employee which under the subheading "Medical Insurance (Blue Cross-Blue Shield of Indiana)" stated without qualification that "both you and your spouse will be covered for the remainder of your lives" at no cost. And a Wheelabrator executive who participated in the negotiation of several of the collective bargaining contracts testified that he believed that they were intended to provide retired employees with vested rights to health benefits. We need not discuss the other extrinsic evidence in support of, or for that matter against, the plaintiff's interpretation. The issue is not what the contract in fact means but whether the plaintiffs are entitled to a trial on what it means.

Wheelabrator points out that ordinarily when a contract expires, it – expires. It is at an end. The parties have no more rights or duties under it. Sometimes, however, a contract creates entitlements that outlast it. At argument the plaintiffs' counsel gave the example of wages due under a contract of employment at will, a contract terminable at the whim of either party. Suppose the employer's practice is to pay employees at the end of each week for the work they have done during the week. Jones, an employee at will, is fired at noon on Wednesday, having worked 20 hours that week. The contract is at an end as of noon that day, and yet, quite apart from any statutory entitlement that employees may have to be paid at the agreed rate for work actually done (*National Metalcrafters v. McNeil*, 784 F.2d 817 (7th Cir. 1986)), the employee would have a compelling argument that the employer's promise to pay for work actually done had survived the expiration of the contract. This is not the best example for

the plaintiffs' point, however, because an alternative conceptualization of employment at will treats it as a unilateral contract that is accepted by the employee's working at the agreed wage. 1A Arthur Linton Corbin, *Corbin on Contracts* § 152 at pp. 13-14 (1963). So understood, a contract of employment at will does not end until the employee is paid. But there are plenty of better examples – examples of bilateral contracts that create obligations that outlive the term of the contract because the parties wanted them to do so. A contract that contains a post-employment restrictive covenant is one, *Tower Oil & Technology Co. v. Buckley*, 99 Ill. App. 3d 637, 425 N.E.2d 1060 (1981); *J.D. Marshall International, Inc. v. Fradkin*, 87 Ill. App. 3d 118, 409 N.E.2d 4 (1980), and there are others. *Litton Financial Printing Division v. NLRB*, 111 S. Ct. 2215, 2226 (1991); *Ryan v. Chromalloy American Corp., supra; In re White Farm Equipment Co., supra*, 788 F.2d at 1193. No doubt a court should cast a cold eye on contentions that a contract with a fixed term actually created a perpetual obligation, *William B. Tanner Co. v. Sparta-Tomah Broadcasting Co.*, 716 F.2d 1155, 1159 (7th Cir. 1983), and should, therefore, as *Senn* and many other cases hold (notably *Litton*), presume that a collective bargaining agreement ceases to obligate the employer when the agreement's term (invariably three years) is up. But it is not an irrebuttable presumption. "Rights which accrued or vested under the [collective bargaining] agreement will, as a general rule, survive termination of the agreement." *Litton Financial Printing Division v. NLRB, supra*, 111 S. Ct. at 2226. The question is what it takes to rebut the presumption. We add that the obligation for which the plaintiffs contend in this suit is not perpetual, because retired

people and their widows (or widowers) do not live forever.

We reject the extreme positions on what it takes to rebut the presumption that all contractual obligations cease on the expiration date stated in the contract. The first is that the contract must either use the word "vest" or must state unequivocally that it is creating rights that will not expire when the contract expires. The second is that testimony about the parties' intentions can substitute for contractual language indicative of intent and therefore create rights and duties that last beyond the expiration of the contract. The first approach could be defended only as a means of making life simpler for courts by creating a form that parties must use to create enforceable rights and obligations; and while we naturally are sympathetic to the institutional concerns behind such a suggestion, we do not think that a court should refuse to enforce a contract merely because the parties have failed to use a prescribed formula. It is one thing for a court to lay down default rules to solve contractual disputes *when the parties' intentions cannot be determined*. That is a wholly appropriate judicial function. It is another thing for us to say to the contract parties, we can see what you're driving at but as you have not used our preferred form of words we shall not enforce your contract. Cf. *Johnson v. United States*, 163 Fed. 30, 32 (1st Cir. 1908) (Holmes, J.). Of course, it was the courts that, long ago, invented the requirement of consideration, which in one aspect is a form with which parties are required to comply as a condition of seeking the enforcement of their "contract." But courts should be cautious about adding formal hoops that contract parties must jump through, and anyway we

do not understand Wheelabrator to be urging us to do that here.

The second extreme, that of allowing parties to substitute oral testimony for contractual language, errs by depriving parties of the protection of a written contract. For we are supposing a case in which the written contract is silent on a subject, and a party asks the court to interpolate a clause on the basis of extrinsic evidence showing that the parties would have included the clause if they had thought about the matter. Courts do sometimes interpolate contract clauses. *Restatement (Second) of Contracts* § 204 (1979). A famous example is Judge Cardozo's interpolation of a best-efforts clause in a contract providing for an exclusive dealership. *Wood v. Duff-Gordon*, 222 N.Y. 88, 118 N.E. 214 (1917). But he based this move on the structure of the contract rather than on self-serving testimony by a party. By granting an exclusive license to market her dress designs, Lady Duff-Gordon had delivered herself into her licensee's power, for unless he had a contractual obligation to market her designs he could threaten to sit on the license and do nothing unless she increased his compensation. It was unlikely that the parties had intended so one-sided a deal. The Supreme Court in *Litton* referred approvingly to a parallel interpolation – that the duty to arbitrate a dispute under a contract providing for arbitration survives the expiration of the contract. 111 S. Ct. at 2226 n. 3. (And it thought this precept applicable to collective bargaining agreements. *Id.* at 2226.) The utility of an arbitration clause would be greatly impaired if the duty to arbitrate disputes arising under the contract expired with the contract, since such disputes might easily remain pending on the date of

expiration. If the contract were terminable by either side on short notice, as is common, a party who saw a dispute looming could escape having to arbitrate it simply by terminating the contract.

Since there is no similar structural necessity for a collective bargaining agreement to include an undertaking by the employer to pay lifetime medical benefits to retired employees, the use of extrinsic evidence to create such obligations nowhere alluded to in the contract would unjustifiably deprive the parties of the limitation of liabilities that is implicit in the negotiation of a written contract having a definite expiration date. Subject only to the limited protection against unforeseeable contractual obligations that is conferred by the doctrine of impossibility, a party might find itself saddled with obligations for the next twenty or thirty years (or even more, in the case of a surviving spouse's benefits) even though it had reasonably believed that all its obligations would end in three years, when the contract expired by its own terms. Although extrinsic evidence is admissible to show that a written contract which looks clear is actually ambiguous, perhaps because the parties were using words in a special sense, *FDIC v. W.R. Grace & Co.*, 877 F.2d 614, 620-21 (7th Cir. 1989), there must be either contractual language on which to hang the label of ambiguous or some yawning void, as in the *Duff-Gordon* case, that cries out for an implied term. Extrinsic evidence should not be used to add terms to a contract that is plausibly complete without them. *Calder v. Camp Grove State Bank*, 892 F.2d 629, 632 (7th Cir. 1990).

If therefore the collective bargaining agreements in this case were completely silent on the duration of health

benefits for retired employees, then since (unlike *Duff-Gordon* and *Litton*) nothing in the structure of the agreements required that the duration be perpetual, we would not allow extrinsic evidence to show that those employees have a perpetual entitlement. But the agreements are not silent on the issue; they are merely vague. They say that once retired employees reach the age of 65 the company will pick up the full tab for their health insurance and that when they die their spouses will continue to receive supplemental health benefits, again at the company's cost. This could be thought a promise to retired employees that they and their spouses will be covered for the rest of their lives. For the provision does not say "when they die or the collective bargaining agreement expires, whichever occurs first," but simply when they die. The corresponding language in *Senn* was weaker: it was that the company "will continue for retired employees" a specified premium contribution. And the final agreement between the company and the union in that case, which could be thought declaratory of earlier understandings, said that coverage "shall be continued *during the term of this Agreement.*" 951 F.2d at 810, 815 (emphasis added). In addition, each agreement in the series contained an integration clause, declaring the agreement to be the exclusive source of the parties' rights and duties, and although the parol evidence rule, which enforces integration clauses by barring evidence of side agreements, does not bar the use of extrinsic evidence to clarify the meaning of an ambiguous text, *FDIC v. W.R. Grace & Co., supra*, 877 F.2d at 620, the presence of such a clause is some indication of the parties' desire to limit a free-ranging judicial discretion to interpolate terms.

We do not suggest that the interpretation of the relevant provision of the collective bargaining agreement in the present case as creating lifetime entitlements to company-paid health benefits is inevitable. The provision in question could mean just that retired employees are covered for the three-year term of the collective bargaining agreement. This inference is strengthened by the explicit use of the term "vesting" in the next section of the 1985 collective bargaining agreement but is weakened by the fact that the preceding section, the one in issue here, was carried over essentially verbatim from the earlier collective bargaining agreements. The vesting provision has a separate provenance, and we are given no reason to suppose that the two sections were actually compared in the drafting process, though a trial might reveal that they were. And if the guarantee of company-paid health insurance is limited to the three years in which the collective bargaining agreement is in force, the ringing promise of spousal benefits has rather a hollow sound, as it is easy to imagine a case in which an employee who retired years later dies in 1987 – and at the stroke of midnight on December 31 of that year his wife's supplemental benefits would terminate, if the company's interpretation is adopted. Yet, continuing the argumentative ping-pong game, we mustn't leap to the conclusion that the company's position makes the benefits to retired employees "illusory." Three years, or even three days, are better than none; and a company is naturally reluctant to saddle itself with indefinite future obligations – though we shouldn't rush to the opposite extreme, and suppose that Wheelabrator will be crushed if it must pay these benefits for life. Their sum is not trivial, but most of the health

costs of the retired are picked up by Medicare rather than by Blue Cross-Blue Shield.

The cynic might argue that the union would never have pressed for lifetime guarantees for *retired* employees – they do not pay union dues, vote in union elections, or vote in representation elections, for they are no longer members of the bargaining unit. *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971). The counterargument is that, knowing this, current employees who may retire in the next three years want their collective bargaining agreement to vest health benefits. *United Auto Workers v. Yard-Man, Inc., supra*, 716 F.2d at 1482. Most, perhaps all, the class members were active employees when a collective bargaining agreement containing the provision for retirees' health benefits was signed.

We could argue back and forth till we were blue in the face over the proper interpretation of the language relating to the retirees' health benefits without reaching a confident conclusion, if all we had to go on was the written contract itself. The contract, even when its logic and its other provisions as well as just the provision in issue are considered, is inconclusive on the question whether it confers an entitlement to health benefits that outlasts the contract's expiration date. A completely intractable issue of contract interpretation can be resolved only by the application of some default rule – a burden of persuasion, a clear-meaning rule, a presumption based on the authorship of the contract. But the time to throw up one's hands and apply such a rule is *after* extrinsic evidence has been considered. For until then, we do not know whether we have an intractable interpretive

issue or merely an issue that cannot be resolved without testimony or other evidence besides the language and logic (as in *Wood v. Duff-Gordon*) of the contract.

Only a posture, not easy to reconcile with the Seventh Amendment, of extreme mistrust of juries would entitle us to pretermit a factual inquiry and apply an interpretive canon or other tie-breaker *before* we know that the sides are actually tied. The contract in this case is ambiguous and both sides are poised to present testimony and documents that they claim will disambiguate it. We think they should be allowed to do so despite the alarm bells rung in the amicus brief submitted to us by an employers' association which argues that without a strong presumption against vesting, companies will be visited with crushing liabilities (but no numbers are provided), unions will be discouraged from negotiating over health benefits, the containment of health costs will be impeded, and already retired employees will receive windfalls at the expense of the newly and the not-yet retired. That is to assign an awful lot of weight to a rule of interpretation that parties are free to change by contract. Employers adamant against assuming perpetual obligations can eliminate all doubt by insisting on a clause that makes any entitlement to health benefits granted by the agreement expire on the date the agreement expires. Employers don't even have to bargain over health benefits of retired employees. *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co., supra.* They certainly don't have to grant such benefits *in perpetuo.* If they did so in the past, not anticipating the recent rise in health costs, they should not expect the courts to bail

them out by undoing the contractually determined allocation of risk on the question. Courts do not sit to relieve contract parties of their improvident commitments, except within the limited dispensation conferred by the doctrine of impossibility, not here invoked. Contracting parties who want to be spared the uncertainties of trial by jury have only themselves to blame if by failing to specify the limits of their undertakings they open the door to extrinsic evidence of contractual meaning.

We are not done, because there is the company's further argument that even if the retired employees have vested rights, the rights are limited to those enjoyed by active employees. Even if this is true, we disagree that it provides an alternative ground for affirming the district court's grant of summary judgment. The plaintiffs claim a lifetime right to benefits – ignore for a moment what level of benefits they might be entitled to. The fact that the company, without acknowledging their entitlement, is continuing to pay them the level of benefits to which (if the company's subsidiary argument is correct) they would be entitled if they had an entitlement cannot be considered a full satisfaction of their claim. Unless their right has vested, the company can cut them off tomorrow. They are entitled to a declaration of their rights. The dispute over those rights is a real one. If they have no contractual guaranty of benefits, they had better start shopping around for other medical insurance.

The language that we quoted earlier from the last collective bargaining agreement seemed to key retired employees' benefits to those of active employees, as the company argues. However, the 1980 agreement had provided for the first time that the health benefits to which

employees were entitled would include "Dental, Vision and Hearing for all retirees" and that "the Drug Program co-payment for retirees will be reduced to $2.00." These two benefits were removed in the last agreement for active as well as retired employees, permissibly so for the latter if the only right that had vested was a right to equality in health benefits with the active employees. The fact that the agreement specified retirees' rights separately from those of active employees, extending to them benefits which previously had been extended to the active employees alone, suggests, though hardly demonstrates, that the collective bargaining agreements did not make the two groups march in lock step. The argument *contra* is that the company was hardly likely to agree to a ratchet, whereby anytime it expanded the benefits for active employees it established a plateau under the retired employees. A vested right to benefits equal to and hence varying with those of the active employees would give the retirees a good deal of protection, since health benefits are an important fringe benefit.

There is additional evidence that the collective bargaining agreements may not have fixed the same level of benefits for active and retired employees. The agreements define "employees" as employees of the Mishawaka plant, but, that plant having been closed, the company is paying the retirees the level of benefits of its active employees in other plants. Suppose it provided different levels of benefit to active employees in different plants. Which level would provide the benchmark for the retired employees? And in 1985 active employees were required to share the cost of the premium for certain benefits while the retired employees continued to receive those benefits

entirely at Wheelabrator's expense. So we cannot be certain that the agreements were intended to give the retirees no greater (net) benefits than active employees, and even if we were certain, there would still be the unresolved question whether the retired employees were receiving those benefits as a matter of grace or of right.

REVERSED AND REMANDED.

CUDAHY, *Circuit Judge*, with whom RIPPLE and ROVNER, *Circuit Judges*, join, concurring in the judgment. The issue here is the appropriate default rule for determining whether collectively bargained retiree health benefits have vested. The default rule imposed in *Senn v. United Dominion Indus., Inc.*, 951 F.2d 806 (7th Cir. 1992), provides, as I understand it, that retiree benefits vest only if the language of the collective bargaining agreement states explicitly that the benefits have vested; resort to extrinsic evidence is improper even if the agreement is ambiguous with respect to vesting. One of the stated reasons for taking the present case *en banc* was to consider whether *Senn* should be overruled. The lead opinion has elected to distinguish *Senn* (on somewhat unconvincing grounds) rather than to overrule it. Although both the lead opinion and dissent pay it passing respects, *Senn* and its default rule now do seem to me to be a dead letter. So far as it goes, this is a constructive outcome.

I agree in large part with the lead opinion. I write separately only to suggest that, while its approach takes us in the right direction, it has stopped short of what could be a better solution. As an initial matter, the lead opinion, in reviewing the possible default rules for determining whether retiree benefits have vested, fails to note

the full spectrum of available rules. It finds, *ante* at 6-7, only three possible default rules for determining when retiree benefits vest:

1. *"Strong" No-Vest Rule.* This rule, specifically adopted in *Senn*, provides that retiree health benefits in collective bargaining agreements do not vest unless the language in the agreement explicitly provides for vesting. If the agreement does not employ the words "vest" or "lifetime" or other clear vesting language, then the presumption against vesting governs, the document is deemed unambiguous and resort to extrinsic evidence is barred.

2. *"Weak" No-Vest Rule.* This rule holds that if the collective bargaining agreement is ambiguous with respect to vesting, resort to extrinsic evidence is proper. However, if a preponderance of the evidence does not show that the parties intended the benefits to vest, the presumption is that they did not.

3. *Parol Substitution Rule.* This rule would allow use of extrinsic evidence to determine the intent of the parties as to vesting even when there is no ambiguity in the collective bargaining agreement, as when the agreement is silent. Presumably, in the absence of extrinsic proof of vesting, the court would infer that the parties did not intend to have the benefits vest.

The lead opinion specifically adopts option 2, the weak no-vest rule. First, it rejects the strong no-vest rule (the *Senn* rule) because its rigidity may frustrate the actual intent of the parties, and it is in tension with the Seventh Amendment right to a jury trial. *Ante* at 6, 11. The lead opinion likewise rejects option 3 because that

rule would resort to extrinsic evidence even when the agreement is silent about retiree benefits, thus "depriving parties of the protection of a written contract." *Id.* at 7. Having rejected both of these "extreme" options, the lead opinion falls back on the one remaining option, the weak no-vest rule, and finds that it comports with settled principles of contract law. What the lead opinion does not consider, however, are the corresponding default rules presuming that the benefits *do* vest. The three parallel rules are:

4. *"Strong" Vest Rule.* This rule would presume that the parties intended the benefits to vest unless they explicitly stated otherwise. If there is an ambiguity, the presumption takes effect and there can be no recourse to extrinsic evidence.

5. *"Weak" Vest Rule.* This rule would presume that benefits vest unless there is evidence of an agreement to the contrary. If the collective bargaining agreement is ambiguous, then consideration of extrinsic evidence is permitted to determine whether the parties did not intend the benefits to vest.

6. *Parol Substitution Rule.* Like its counterpart, it would resort to extrinsic evidence even when the collective bargaining agreement is silent (or otherwise unambiguous) about the vesting of benefits. But in the absence of proof that the parties did not intend the benefits to vest, it would presume the benefits vested.

I agree with the lead opinion that we can dispose summarily of the parol substitution rules, options 3 and 6. Both rules would denigrate the function of a written contract, in derogation of the traditional parol evidence

rule. Choosing among the four remaining default rules, however, is more difficult. As both the lead opinion and dissent recognize, options 1 and 4 (the strong rules) have their advantages. The requirement of clarity serves a worthy purpose. The strong rules would motivate parties to reach an explicit agreement and save courts from the difficult task of interpreting *ex post* what the parties intended. Options 2 and 5 (the weak rules), on the other hand, would likewise tell the parties what the law would presume in the absence of an agreement, but these rules would not foreclose judicial inquiry into extrinsic evidence to determine the actual intent of the parties. Of course, depending on which view – the lead's or the dissent's – one supports, access to extrinsic evidence is the greatest strength or weakness of options 2 and 5.

We should recognize initially that, when those affected by a chosen default rule can easily bargain around it to agree to a mutually beneficial course, the rule choice will generally make little difference to the parties' actual agreement. *Ante* at 11-12; *Post* at 31; Ronald Coase, *The Problem of Social Cost*, 3 J. Law & Econ. 1 (1960). When bargaining is easy, courts selecting a default rule may properly look past those parties affected by the rule to other advantages or disadvantages a particular rule may entail, such as the costliness of its administration. In theory, the strong rules have some intuitive appeal because it should be easy for companies and unions to bargain around any presumption we might impose; again theoretically, it should make little difference to the parties what rule would apply should they not address the vesting question. The parties are sophisticated and the cost of bargaining is slight. On the other

hand, unions and companies might sometimes prefer ambiguity: the retirees can feel secure, while the bargainers leave some unspoken flexibility for future bargains. In any event, the strong rules mean no more ambiguities, no more extrinsic evidence and no more prolonged litigation.

But this logic ignores one crucial factor: the parties before us here, and many who have yet to come before us, *cannot bargain around our default rule.* Our default rule comes too late for them – *the bargain has been struck.* When the parties or the situation are such that those affected by the rule cannot bargain around it, the choice of default rule is different; for the rule may, in effect, supply terms to which the parties are bound but to which they have not explicitly agreed. In these circumstances, courts should try to select the default rule that best reflects the course the parties would have taken had they bargained freely. Frank H. Easterbrook & Daniel R. Fischel, The Economic Structure of Corporate Law 15 (1991); Richard Posner, Economic Analysis of Law 372 (3d ed. 1986). But because the parties did, in fact, bargain at arms-length, what they *would have negotiated* is precisely what they *did negotiate.* Thus, when applying a default rule retrospectively to transactions negotiated at arms-length, courts should select the rule that best reflects what the parties *did negotiate* and that enables the negotiated terms to take effect.

Under those circumstances, we encounter the major flaw of the strong rules. The strong rules presume that parties to all collective bargaining agreements were negotiating under the same assumptions, and foreclose evidence of what the parties actually negotiated.

Realistically, however, certain parties to a series of collective bargaining agreements, in the absence of a judicially imposed default rule, may have their own default rule; and their default rule may not be the same as that adopted by various other parties to collective bargaining agreements. As the dissent correctly notes, the parties to a collective bargaining agreement have an ongoing relationship, in which the parties, often represented by the same persons, meet every three years to negotiate over terms previously negotiated. The understandings and practices of the parties develop a sort of common law for interpreting their agreements.[1] Yet the imposition of a strong rule would bind the parties to certain default terms even when there is evidence that they were working under exactly the opposite assumptions. A strong rule, consequently, may frustrate what the parties actually intended.[2]

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[1] [T]he parties occasionally have understandings or expectations that were so fundamental that they did not need to negotiate about those expectations. When the court "implies a promise" or holds that "good faith" requires a party not to violate those expectations, it is recognizing that sometimes silence says more tha[n] words. . . .

Arthur Corbin, Corbin on Contracts § 570 (Colin K. Kaufman ed., Supp. 1984).

[2] The dissent suggests that *Litton Fin. Printing v. NLRB*, 111 S. Ct. 2215 (1991), mandates the imposition of the strong no-vest rule. *Litton*, however, held that a collective bargaining agreement's arbitration clause did not terminate on the expiration of the agreement, but continued after the agreement's termination to apply to disputes "arising under the contract." *Id.* at 2225. Further, the language of the Court in *Litton* clearly recognizes

The weak rules, on the other hand, are more flexible in that they are better able to respect the agreement of the parties. Of course, they do provide clear presumptions around which the parties can effectively bargain. And, as noted, *prospective* application of a weak rule should not be too different from prospective use of a strong one. But *retrospective* application of a weak default rule, unlike a strong rule, enables parties to correct the imposition of default terms by using extrinsic evidence of actual intent. To be sure, with flexibility goes ambiguity and the greater likelihood of litigation. But this is not too high a price to pay when something as crucial as retiree health benefits is at stake. Getting at the real intention of the parties seems well worth the costs of making the determination. *See, e.g., Air Line Stewards and Stewardesses Ass'n, Local 550, etc. v. American Airlines, Inc.*, 763 F.2d 875, 877-78 (7th Cir. 1985) ("the primary object in construing a contract is to give effect to the intention of the parties."), *cert. denied*, 474 U.S. 1059 (1986).

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the existence of vested benefits quite independent of "explicit terms." What the Court said bears repeating:

> Rights which accrued or vested under the agreement will, as a general rule, survive termination of the agreement. And of course, if a collective bargaining agreement provides in explicit terms that certain benefits continue after the agreement's expiration, disputes as to such continuing benefits may be found to arise under the agreement, and so become subject to the contract's arbitration provisions."

Id. at 2226. The Court does not state that a contract right vests only if the agreement so provides in explicit terms. Rather, vesting is a matter of contract interpretation, which seeks to determine the intent of the parties.

Hence, I think the only real choice is between the two weak rules, options 2 and 5, and here I must differ with the lead opinion. For I may see a different social reality within which these agreements were entered.[3] Before about 1980, I seriously doubt that it occurred to many employers to grant retiree health benefits on anything less than a lifetime basis.[4] The overwhelmingly prevalent trend of labor contracts was to continue or improve retiree benefits from contract to contract. It was only in the eighties, with spiraling medical costs, heightened foreign competition, epidemic corporate takeovers and the declining bargaining power of labor, that thought was first given to reducing retiree benefits from contract to contract or even (though this seems more implausible) to

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[3] [W]hat parties *do* "agree to," particularly when they are silent, must be interpreted in light of [those] assumptions about reality that they share. These assumptions are captured in the prevailing conventions in the relevant community of discourse.

Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 Va. L. Rev. 821, 902 (1992).

[4] Nothing in *Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), suggests otherwise. In that case, a collective bargaining agreement specified that the company could discontinue part of its contributions for retiree health insurance if Medicare was enacted by Congress. Upon the enactment of Medicare, the company attempted to modify the retiree health plan. Instead of reducing or eliminating the negotiated retiree benefits, the company sought simply to substitute Medicare coverage for the negotiated health plan "by offering to pay the supplemental Medicare premium if the employee would withdraw from the negotiated plan." *Id.* at 162. No retiree would have his benefits taken away, and no retiree would have his negotiated benefits substituted for Medicare without his consent.

eliminating such benefits entirely. I think that, at least before the eighties were in full swing, prevailing conditions suggested a presumption among unions and management alike that retiree health benefits vested unless there was agreement to the contrary. Hence, I would lean toward option 5 and the application of the weak vest rule – the position adopted by the Sixth Circuit in the seminal case, *International Union, United Auto, etc. v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984). *See also Keffer v. H.K. Porter Co.*, 872 F.2d 60, 64 (4th Cir. 1989) (citing *Yard-Man* as "consistent with a more far-reaching understanding of the context in which retiree benefits arise."); *Local Union No. 150-A, United Food & Commercial Workers, etc. v. Dubuque Packing Co.*, 756 F.2d 66, 69-70 (8th Cir. 1985) (inferring that benefits vested because "[t]here is simply no evidence that the Company and the Union did not intend to vest the right to benefits in the retirees."). But, looking at things as they are rather than as they might be, the direction indicated by the lead opinion in adopting option 2 and the weak no-vest rule is a significant improvement over the apparently extreme course suggested by *Senn*.

EASTERBROOK, *Circuit Judge*, with whom BAUER, *Chief Judge*, and COFFEY and MANION, *Circuit Judges*, join, dissenting. For more than two decades Wheelabrator and the unions representing its employees in Mishawaka, Indiana, maintained collective bargaining agreements providing retired workers with health benefits. Starting in 1980 these benefits matched those of active workers. Whatever current workers received, the retirees received. Even though Wheelabrator has closed the Mishawaka plant

and the last agreement has expired, retirees continue to receive the health benefits available to active workers at the firm's other plants, at levels to which other unions have assented. Wheelabrator introduced a copayment system under which covered persons pay 20% of the cost of their care, with a maximum copayment of $1,200 per person or $2,400 per family. The maximum benefit rose from $150,000 to $500,000. The firm eliminated dental, vision, and hearing benefits. These changes help some retirees (those facing major medical expenses) while requiring others to pay more for routine care. Copayments induce employees and retirees alike to shop for lower prices and produce savings that permit the higher maximum benefit.

Mishawaka's retirees want more. They demand free health care for life; they welcome the higher maximum benefit but want to escape the copayments and receive reimbursement for vision, dental, and hearing expenses. Plaintiffs think it dandy that their benefits rose with active workers' [sic] and contend that they have a contractual ratchet: their benefits cannot follow active workers' [sic] into decline – if the restructuring of the benefit package can be called a "decline."

Until the 1985 contract, none contained language implying that the level of benefits vests on retirement or at any other time – and that contract established a special rule for persons who retired at age 65 in 1986 or later. Wheelabrator has not instituted copayments for these retirees. Nothing in the contracts provides that the scope of coverage for other retirees will never change. Their schedule of benefits, which the collective bargaining agreement establishes only by reference to the insurance,

is all today's case is about. Duration is not in dispute. Yet the lead opinion devotes almost all of its attention to duration, relegating the level of benefits to an afterthought, and the concurring opinion discusses duration exclusively, disdaining this case in order to address questions that might be important in other cases.

The result is a disposition that is largely advisory. Litigation began after Wheelabrator instituted a system of copayments. Retirees contended that they possess a contractual entitlement to unreduced benefits for life. That the retirees stressed "for life" rather than "unreduced" is no surprise: all of their parol evidence is about "life-time" benefits, so they sought to divert the court's attention from the weak link in their claim. Wheelabrator denied that the contracts promise any particular level of benefits and, adopting the common belt-and-suspenders strategy, added that any guarantees expired in 1988. Like the retirees, Wheelabrator would like victory on a rationale that produces the most favorable implications for tomorrow's case. The parties' understandable druthers do not authorize us to address a hypothetical dispute, however. The only controversy between these parties is whether the retirees are entitled to medical benefits exceeding those of active workers. What would happen if Wheelabrator were to cut off the retirees, which it has never threatened to do, is a question for another day. *Los Angeles v. Lyons*, 461 U.S. 95 (1983); *Foster v. Center Township*, 798 F.2d 237 (7th Cir. 1986). If Wheelabrator had sent its retirees letters saying: "We believe that we need not continue your benefits, but we have no plans to terminate them", the retirees would not have a justiciable controversy with their old employer about the meaning of the

collective bargaining agreements. The retirees have not even received such letters. Parties cannot require (or authorize) adjudication of an issue that could arise in the future just by demanding a declaratory judgment. The retirees' only live grievance concerns the details of an ongoing medical plan.

What do the collective bargaining agreements say about the level of benefits to which the retirees are entitled? In a word: Nothing. The first agreement (from 1965) provides that "employees who have retired since September 22, 1959 will have the full cost of their Blue Cross-Blue Shield coverage paid by the Company after they attain 65 years of age (subject to the provisions of the supplemental insurance plan listed in Paragraph (b) below). Employees retiring prior to age 65 years will be required to pay one-half of their Blue Cross-Blue Shield plan until such time as they reach age 65."[1] Similar provisions appear in later contracts, which add other health benefits.[2] The agreements say what portion of the cost

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[1] Paragraph (b) provides that Wheelabrator will establish a supplemental plan that, "when combined with Medicare, will provide a level of benefits equal to the Wheelabrator Blue Cross-Blue Shield plan for active and retired employees 65 years of age or over. The Company will pay the cost of such supplemental plan." Thus Wheelabrator promised to give its employees a package of Medicare and private insurance equal to the private insurance provided to active employees.

[2] For example, a provision of the 1971 agreement reads: "Effective April, 1972, the retirees will be covered by the same drug program as the active employees." The 1974 agreement adds: "Effective October 15, 1974, retirees and spouse [sic] will be covered by major medical coverage." By 1980 the retirees had obtained the same dental and eye care as active employees.

retirees will pay, but they do not specify what the "Blue Cross-Blue Shield plan" entails. That was left to the agreement Wheelabrator struck with its carrier. Only the insurance policies specify the extent of coverage, and each policy reserves Wheelabrator's right to alter things. These contracts use language tracking the agreements in *Boyer v. Douglas Components Corp.*, 986 F.2d 999 (6th Cir. 1993), and *Gill v. Moco Thermal Industries, Inc.*, 981 F.2d 858 (6th Cir. 1992). *Boyer and Gill* hold that the insurance policy is the "plan" under ERISA and outranks oral promises. So the shouting should be over. Retirees receive the same "Blue Cross-Blue Shield plan" as active employees, and by virtue of express language Wheelabrator controls the scope of the plan's coverage.[3]

Plaintiffs' entire submission rests on a confusion between free "coverage" and free "care." Medical insurance can be free without being comprehensive. To see the difference, consider a common medical plan: full payment for the costs of hospitalization, but a maximum of 365 days of continuous care. Starting on day 366 the sick or injured person pays the tab himself. An insurance policy with these benefits might cost $2,000 per year in the market. Providing such a policy to retirees at no cost gives them a free "Blue Cross-Blue Shield plan" but not free medical care. In 1965, when the contract first provided some health coverage after retirement, the duration was limited. Major medical coverage did not come until

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[3] In 1985 Wheelabrator added four new medical plans. Persons who retired at age 65 and elected fully vested benefits were not entitled to choose the most generous of the five plans. Nothing turns on this complication, however.

1974, and even then there was a cap on total benefits payable for a single illness. Just as a medical plan may be limited in scope or duration, so it may be limited in the percentage of costs paid. Consider an alternative plan, which pays 80% of all hospital costs without a maximum number of days. An insurer might charge $2,000 per year for this policy, too; providing such insurance to employees would given them a free "Blue Cross-Blue Shield plan" without giving them free medical care. And this is what happened. Wheelabrator's current medical package includes benefits of greater duration and maximum payment than the 1965 (or, for that matter, 1985) plan but requires copayments that encourage shopping among providers and discourage demands for unnecessary medical care. The labor agreements do not promise the retirees free medical *care*, as opposed to medical *coverage* commensurate with active workers.

The only thing in any of the agreements that could be understood as a promise of particular care appears in the 1980 contract: "Effective 7/1/81 these benefits include Dental, Vision and Hearing for all retirees." This sentence appears immediately after the statement that Wheelabrator "will pay the full cost of Blue Cross/Blue Shield" for retirees who meet age and years-of-service requirements. Active workers already enjoyed dental, vision, and hearing benefits. The 1980 contract brought the retirees to parity. Read favorably to Wheelabrator, this sentence means that as of July 1981 the Blue Cross/Blue Shield plan *does* include particular benefits; it does not promise continuation of these benefits. Read favorably to the retirees, the sentence means that the Blue Cross/Blue

Shield plan *must* include particular benefits. As the dental, vision, and hearing benefits were abolished in 1989 (for active workers as well as retirees), this sentence provides the plaintiffs with their best shot.[4]

Curiously, the lead opinion makes little of this sentence, and the concurring opinion does not mention it. It comes up at page 13 of the lead opinion. But the court then equates all questions about level and duration, even though the sentence in question, if read most favorably to the retirees, puts dental, vision, and hearing benefits on a plane *different* from other categories of benefits. By my colleagues' lights, the question for trial ought to be whether the agreement assured these three kinds of benefits to persons who remained on the payroll after July 1, 1981. (Those who retired earlier furnished no consideration for any promise in the 1980 contract.) Debate about the copayment system should end forthwith. There is no textual ambiguity on that subject – at least none the majority deigns to mention. And as I have stressed, there is no case or controversy about whether "the retired employees were receiving those benefits as a matter of grace or of right." Slip op. at 13. Advisory opinions rendered by juries are no more palatable than those rendered by judges.

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[4] The sentence in the 1980 contract about the $2 copayment for drugs does not assist the retirees. The drug program is subject to this provision: "Effective April, 1972, the retirees will be covered by the same drug program as the active employees." An entitlement to "the same drug program as the active employees" is the antithesis of a ratchet.

I do not think that even the sentence "Effective 7/1/81 these benefits include Dental, Vision and Hearing for all retirees" creates a jury question. I start from the premise that when a labor agreement is not ambiguous, the court should declare its meaning without ado. *Ooley v. Schwitzer Division, Household Manufacturing Inc.*, 961 F.2d 1293, 1298-99 (7th Cir. 1992); *Senn v. United Dominion Industries, Inc.*, 951 F.2d 806, 814-16 (7th Cir. 1992). A majority of this court (the three judges subscribing to the lead opinion plus the four joining this one) reaffirms *Senn* – not only its holding that extrinsic evidence cannot create an ambiguity in otherwise clear documents, but also its holding that health and welfare benefits promised in collective bargaining agreements presumptively expire with those agreements. See also *Merk v. Jewel Companies, Inc.*, 848 F.2d 761, 763 (7th Cir. 1988). These principles should lead us to affirm. Put in context, the single sentence in a single agreement means no more than the surrounding sentences: as of 1981, the retirees at last get the same plan as the active workers.

Pensions vest by law; ERISA establishes elaborate schedules and tables. 29 U.S.C. §1053. Health and other welfare benefits are left to contract. That leaves in place the venerable rule that parties may agree to as much or as little as they please. Wheelabrator and its unions did not agree on a perpetual schedule of health benefits. They incorporated an insurance contract by reference. See *Boyer* and *Gill*. Ever since, Wheelabrator has furnished its retirees at Mishawaka with the same benefits to which active workers at other plants have assented.

Is there any reason to read into the agreements a ratchet that their language does not express? Labor law

has modified contractual freedom in light of the statutory duty to bargain. An employer may not walk away from workers the same way a supplier of oil may walk away from customers. Instead the employer must bargain collectively with its employees. Once an existing agreement has ended and the bargaining obligation has been fulfilled, however, the employer may put its proposals into force, modifying or abandoning the terms that formerly applied. *NLRB v. Katz*, 369 U.S. 736 (1962); *Lapham-Hickey Steel Corp. v. NLRB*, 904 F.2d 1180, 1185 (7th Cir. 1990). Parties may agree on immutable benefits, which continue by force of contract. But the presumption is and always has been that benefits mentioned in a collective bargaining agreement do not vest. "As with the obligation to make pension contributions in *[Laborers Health and Welfare Trust Fund v.] Advanced Lightweight Concrete Co.*[, 484 U.S. 539 (1988)], other contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement. Exceptions are determined by contract interpretation. Rights which accrued or vested under the agreement will, as a general rule, survive termination of the agreement. And of course, if a collective bargaining agreement provides *in explicit terms* that certain benefits continue after the agreement's expiration, disputes as to such continuing benefits may be found to arise under the agreement". *Litton Financial Printing Division v. NLRB*, 111 S. Ct. 2215, 2226 (1991) (emphasis added). In *Litton* the Court looked for the "explicit terms" requiring the employer to honor seniority after the terminal date of the contract and, finding none, rebuffed the union's claim. It did not search outside the terms of the agreement.

Provisions in a collective bargaining agreement establishing benefits for retirees turn out to be a weak sort of promise. For retirees' health benefits are not a mandatory subject of collective bargaining. As a result, the employer may change levels of benefits without dickering with the union. So much is the holding of *Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), where the employer made a mid-term alteration without, the Court held, shirking any duty of bargaining. Health and welfare benefits after retirement turn out to be unilateral rather than bilateral contracts. An employer may bind itself by making a sufficiently strong promise, *id.* at 181 n.20; cf. *Nolde Brothers, Inc. v. Bakery & Confectionery Workers*, 430 U.S. 243 (1977), but the extent of this promise depends on the employer's words and deeds, not what the union's negotiators think or say. Many courts have concluded that in unilateral promise cases employers may reduce or even discontinue post-retirement health benefits despite language stronger than that in the Wheelabrator pacts, and without regard to extrinsic evidence of the employees' beliefs. E.g., *Boyer* and *Gill* (both holding that the terms of the insurance policies are dispositive); *Meester v. IASD Health Services Corp.*, 963 F.2d 194, 197 (8th Cir. 1992) ("welfare benefit plans . . . may be terminated at any time in the absence of a specific expression of contrary intent by the employer."); *Alday v. Container Corp. of America*, 906 F.2d 660, 665 (11th Cir. 1990); *Howe v. Varity Corp.*, 896 F.2d 1107, 1110 (8th Cir. 1990); *Musto v. American General Corp.*, 861 F.2d 897, 907 (6th Cir. 1988); *Moore v. Metropolitan Life Insurance Co.*, 856 F.2d 488, 491-92 & n.1 (2d Cir. 1988). Although these opinions do not deal with collective bargaining agreements, after

Pittsburgh Plate Glass the "collective" part is so much window dressing. We must treat the retirement-benefits aspect of the document as terms unilaterally announced by the employer.

Let us suppose, nonetheless, that the document is a bilateral contract. What sort of language causes duties to extend past an expiration date? The lead opinion rejects as "extreme" the view that "the contract must either use the word 'vest' or must state unequivocally that it is creating rights that will not expire when the contract expires." Slip op. at 6. In the discussion that follows, the lead opinion does not discuss *Litton*, which said that it takes "explicit terms" to create benefits surviving the expiration of a collective bargaining agreement. The concurring opinion invites us to look past the text of the agreement to the "intent of the parties" but does not explain how this can be squared with *Litton's* emphasis on words rather than mental states. Slip op. at 18 n.2. Looking for "explicit terms," and preferring the actual content of the parties' agreement to the supposed content of the parties' heads, serve vital functions.

One appears in *William B. Tanner Co. v. Sparta-Tomah Broadcasting Co.*, 716 F.2d 1155, 1159 (7th Cir. 1983): as the duration and cost of the supposed promise increase, so does the level of formality required to conclude that a promise exists. Even that staunch supporter of subjectivism, Professor Corbin, concluded that courts should not interpret ambiguous writings to create lifetime promises. Arthur Linton Corbin, 3 *Contracts* §553 (1960). Instead, he believed, courts should look for terms such as "lifetime" – language these parties used in the 1985 agreement but no earlier one. It unsettles and in the end disserves the

institution of voluntary agreement to permit straws in the wind to become shackles. "People write things down in order to assign duties and allocate risks – functions vital to economic life yet defeated if courts . . . use the ambiguities present in all language to frustrate the achievement of certainty." *Continental Bank, N.A. v. Everett*, 964 F.2d 701, 705 (7th Cir. 1992).

Another reason why we should search for "explicit terms" lies in the nature of labor relations. Unlike one-shot contracts for the sale of goods, labor agreements endure and evolve. Relational contracting over long periods requires flexibility. What worked yesterday may be counterproductive today. Labor and management need freedom to adapt their arrangement as circumstances change. E.g., *Consolidated Rail Corp. v. Railway Labor Executives' Association*, 491 U.S. 299, 308-09 (1989); *Transportation-Communication Employees v. Union Pacific R.R.*, 385 U.S. 157, 160-61 (1966); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-81 (1960); *McKinney v. Missouri-Kansas-Texas R.R.*, 357 U.S. 265, 272-74 (1958). Usually parol evidence facilitates flexible arrangements. People may choose the written or oral word according to their needs. When we use extrinsic evidence to create long term promises, however, we *defeat* accommodation to changed circumstances. Vesting means that however much labor and management believe that a new approach is called for, they are forbidden to achieve it: the employees, as third party beneficiaries, may enforce the old agreements no matter what union and management now prefer. In using extrinsic evidence to carry out what may have been the parties' intent yesterday, we defeat their plans today. Labor and management may tie their

hands if they want, but, because eliminating the ability to bargain today is so at variance with the norm, we should be sure (by insisting on express provision) that this was indeed the agreement.

Especially when the sort of evidence that could be understood to support lifetime benefits will be present almost all of the time. Because collective bargaining arrangements last decades and govern the affairs of so many, it will be possible to come up with evidence that someone thought that arrangements under the existing agreement would last forever. Notice how distant the evidence in this case is from the usual parol evidence of meaning. Courts seeking to learn the objectives of the parties turn to the negotiations – what the negotiators said to each other, the documents they exchanged. If the negotiators used "benefits will continue after retirement" to mean "the levels of benefits will never fall," that will show up in the signs they exchange at the table. Plaintiffs have no evidence of that kind. Instead they offer statements to show how particular persons understood the contracts *after* they had been signed. Readings by third parties do not show what the negotiators were trying to achieve and do not imply that they selected phrase X to achieve objective Y. By turning to understandings rather than to the negotiations, we decrease the importance of the document the parties actually sign, making it hard for the negotiators to achieve their goals.

Extended dealings, producing multiple understandings, pose a special problem when the supposedly illuminating information is oral. Someone asked in 1990 what he "understood" about the meaning of an agreement reached in 1965 may remember and report not what

he actually thought in 1965 but what occurs to him today. And what he remembers today may turn out to be whatever serves his interests today. Even for witnesses who seek to report accurately, cognitive dissonance produces a remarkable consonance between events *as they recall them* and their contemporary interests. Juries may be good at nosing out liars, but the problem is using memories and understandings is that there will be disagreement even when no one plays false to his recollections. We will have only conflicting understandings, memories, and hopes. Divergence in reported beliefs increases as the events retreat and as the parties no longer need accommodate. These collective bargaining agreements were written for unions, managers, and arbitrators in living relations, not for juries in dead ones. Once the plant has closed, it is all too easy for jurors to award a bundle to their neighbors at the expense of a distant corporation. After a week-long trial in *Senn* it took the jury exactly 20 minutes to conclude that the agreements had established vested benefits. 951 F.2d at 812, although this court thought that there was no evidence at all to that effect.

Risk of a "gotcha!" at the end of a collective bargaining relation affects conduct during its course. Adaptions run from a bald declaration that nothing vests, as in *Ryan v. Chromalloy American Corp.*, 877 F.2d 598, 600 (7th Cir. 1989), to formal vesting coupled with lower levels of benefits, and everything in between. So long as the rule of law is clear, the parties can arrange their own affairs. A presumption so weak that everything is up for grabs after the fact – and this is the upshot of the majority's approach – lacks that virtue. Exposed to irreducible risk

of surprise awards or inability to adapt to changing conditions, employers respond by curtailing the categories of events they are willing to cover. Third parties, too, are affected. Many employers obtain insurance for their health and welfare plans. Sometimes the plans are defined by reference to the insurance, as Wheelabrator's was; sometimes the insurance is defined by reference to the plan. E.g., *Chicago Pacific Corp. v. Canada Life Assurance Co.*, 850 F.2d 334 (7th Cir. 1988). Insurers do not know what managers say to workers considering retirement and cannot be bound by this extrinsic evidence. So we face the possibility of a disjunction between the benefits and their funding, or perhaps we shall end up surprising the insurers too. Either way, both employers and insurers rationally reduce their promises to take account of increased risk. Uncertainty never promotes efficient production and may hinder it.

A word about the evidence the retirees want to offer against Wheelabrator. Statements describing "lifetime" benefits sound impressive until you recognize that there are at least three distinct issues: (1) what will happen to the retirees while the current rules remain in force?; (2) must the employer continue to provide some health benefits to former workers after the current agreement has expired?; and (3) must the employer maintain an unchanged level of benefits for retirees? All of the statements concern the first or second question, while our case is about the third. Between 1965, and 1980, retirees' benefits were less than those of active workers. Under the agreements in force from 1981 through 1988, retirees received free medical benefits tracking those enjoyed by current workers. What the plaintiffs must show in order

to prevail is that Wheelabrator promised that this would never change – that "Blue Cross-Blue Shield coverage" of which the agreements speak could expand but not shrink. None of the statements establishes such a promise. In particular, not a scrap of the extrinsic evidence concerns the meaning of: "Effective 7/1/81 these benefits include Dental, Vision and Hearing for all retirees." Yet this sentence is the only support the lead opinion offers for its assertion that ambiguity about the level of benefits requires a trial – a trial about *everything*, including the copayment system. What question do my colleagues think the jury must answer? What is the ambiguous text? What are the alternative readings of that text? How should the jury be told to resolve this ambiguity? The lack of answers speaks volumes about the advisory quality of the court's opinion. Alas, the district judge cannot escape so easily on remand.

I accept the force of the lead opinion's observation that employers who promised health benefits to their employees without "anticipating the recent rise in health costs . . . should not expect the courts to bail them out by undoing the contractually determined allocation of risk on the question. Courts do not sit to relieve contract parties of their improvident commitments". Slip op. at 12. Health care after retirement is deferred compensation. An increase in the cost of carrying out a promise does not justify abandoning the covenant. A firm that has promised too much to too many people may write down its commitments in bankruptcy, shaving a little off each rather than tossing one group of promisees to the wolves. Still, it is necessary to ascertain the "contractually determined allocation of risk on the question." Employers

drafting in the wake of *Pittsburgh Plate Glass* would have supposed that unless they said otherwise *explicitly*, they may alter retirees' health benefits. The understanding that at the end of a collective bargaining agreement employers may implement their last offer, unless "explicit terms" curtail this power, would have strengthened this supposition. What the majority of our court requires is that employers reiterate these rules of law in the body of the agreement or lose their protection. Although it misleads to say that rules of law are "incorporated into" contracts, see *General Motors Corp. v. Romein*, 112 S. Ct. 1105, 1110-12 (1992), law provides the background against which the parties' words carry meaning. Labor law supplies a benchmark: employers may change terms on the expiration of an agreement (and sometimes during its course) unless they explicitly surrender that entitlement. To say that the norm vanishes as soon as someone disputes the meaning of the agreement is to dishonor a "contractually determined allocation of risk" that depends on or incorporates that norm. Judges may say that employers "have only themselves to blame" if the employers drafted carelessly; but if courts *create* ambiguity by pulling the rug out from under firms that relied on the principles reflected in *Pittsburgh Plate Glass* and *Litton*, then it is we who are responsible.

Uncertainty now reigns. In at least one circuit health and welfare benefits mentioned in collective bargaining agreements presumptively vest on retirement. *UAW v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983). In this circuit such benefits presumptively do not vest, but the presumption is weak. Other circuits have still other formulae. E.g., *Anderson v. Alpha Portland Industries, Inc.*, 836

F.2d 1512 (8th Cir. 1988). And in most circuits employers retain complete freedom to alter retirees' health benefits in the absence of collective bargaining agreements, see cases cited at slip op 28 – although after *Pittsburgh Plate Glass* it is impossible to understand why the existence of a collective bargaining agreement augments the force of the employer's promise. Employers with national operations are subject to multiple and inconsistent rules, compounded by the uncertainty inherent in sending big-stakes questions to the constantly-changing panels that are juries. See Michael S. Melbinger & Marianne W. Culver, *The Battle of the Rust Belt: Employers' Rights to Modify the Medical Benefits of Retirees*, 5 DePaul Bus. L.J. 139, 145-60 (1992) (cataloging six distinct approaches). Uncertainty never promotes industry. Risk is an uncompensated, and substantial, cost of operations, and in this respect the fortunes of labor, capital, and consumers – that is, of us all – are linked.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

July 31, 1992.

Before

Hon. WILLIAM J. BAUER, Chief Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. RICHARD A. POSNER, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge
Hon. DANIEL A. MANION, Circuit Judge.
Hon. MICHAEL S. KANNE, Circuit Judge

KENNETH P. BIDLACK, *et al.*, *Plaintiffs-Appellants*,	)	Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.
No. 91-2378 v.	)	
WHEELABRATOR CORPORATION, *Defendant-Appellee.*	)	No. 89 C 360 Robert L. Miller, Jr., *Judge.*

Order

The assignment of this case to a panel is withdrawn, and the case is set for hearing by the court in banc under Circuit Rule 40(f).

We solicit the views of the parties on the following questions:

1. Whether *Seen v. United Dominion Industries, Inc.*, 951 F.2d 806 (7th Cir. 1992), should be overruled. In particular, should this circuit retain a default rule that health and welfare benefits established in collective bargaining agreements do not vest on an employee's retirement?

2. If the court retains *Senn*, under what circumstances, if any, may extrinsic evidence be used to demonstrate the parties' intent to create vested benefits? In particular, (a) should the *Senn* default rule be applied before or after resort to extrinsic evidence of the parties' intent, and (b) if the *Senn* default rule is applied before resort to extrinsic evidence, should it preclude such evidence in cases of extrinsic ambiguity?

The briefs, which may not exceed 30 pages, should be filed within 45 days.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

LAWRENCE J. ARNDT, et al.,	)	
Plaintiff	)	
	)	CAUSE NO.
vs.	)	S89-360 (RLM)
THE WHEELABRATOR CORPORATION,	)	
Defendant	)	

MEMORANDUM AND ORDER

A group of retirees, spouses, and children contend that a series of expired collective bargaining agreements guaranteed them health benefits at certain levels for life. They contend that the defendant violated the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, and the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.*, by modifying those health benefits after the agreements expired. The defendant employer contends that nothing in the agreements or the plan documents indicates an intention to preclude such a modification. Both sides have moved for summary judgment. For the reasons that follow, the court concludes that the law of this circuit compels judgment for the defendant employer.

I.

The Wheelabrator Corporation operated a manufacturing plant in Mishawaka, Indiana for many years until it closed the facility in 1988. During the plant's operation, its production and maintenance employees were represented by United Auto Workers ("UAW") Local 995, and its research and development employees by UAW Local 5. The UAW locals negotiated contracts with Wheelabrator on behalf of current and retired employees. The first contract providing health insurance for retirees was in 1962.

The 1965 agreement contained a provision that, "Those employees who have retired since September 22, 1959 will have the full cost of their Blue Cross-Blue Shield coverage paid by the Company after they attain 65 years of age. . . . " There was no express provision that this benefit was established for the life of the retirees, but a letter to retirees from the Director of Industrial Relations shortly after this contract was signed stated that:

> Effective on January 1, 1966, the Company will pay the full cost of your Blue Cross-Blue Shield premium.
>
> Effective on July 1, 1966, and thereafter during your lifetime, the Company will continue to pay the full cost of your Blue Cross-Blue Shield premium; but you will be re-enrolled in a Company group program which, combined with Medicare provisions taking effect on that date, will provide a level of benefits equal to those offered active employees.

From 1965 until 1987, retiring employees received a form letter entitled "Your Benefits As A Union Retiree of

Wheelabrator-Frye Inc." from the personnel administrator, which stated that, "Both you and your spouse will be covered [for health insurance] for the remainder of your lives." In response to inquiries regarding the status of coverage, Wheelabrator assured retirees that they were covered for life.

Glenn Fulmer, a union negotiator as well as Wheelabrator's Manager of Labor Relations from 1970 to 1982, testified that he normally met with employees before their retirement and told them that they would have the same level of insurance benefits for life that they had as active employees. This was his understanding from his negotiations. However, Mr. Fulmer's superior, Ralph E. Sanford, stated in his affidavit that neither he nor Mr. Fulmer had authority to make such a statement or to commit Wheelabrator to such a position, and further that it was not Mr. Fulmer's responsibility to explain benefits to retirees.

In the 1968 collective bargaining agreement, the Medicare supplement was expanded to provide that, "Such supplemental benefits shall be continued for the spouse after the death of the retiree." Subsequent collective bargaining agreements continued to expand the retirees' health insurance coverage. In 1982, the agreement between Wheelabrator and Local 995 made several amendments to the benefits provided, but the section covering retirees' health insurance was unchanged. It did state that:

> In case of a plant closing, the Company agrees that employees eligible to retire with paid up insurance but who lack (1) one year of either age or service, will be considered eligible.

In the opinion of the UAW's chief negotiator, this meant that if the plant closed, those within a year of eligibility for retirement would have their health insurance premiums paid for life. At the ratification meeting, the Union explained the amended agreement to its members in a document, which stated:

> INSURANCE-----If plant closes, all those eligible to retire at the time of closing, plus those within one (1) year of being eligible to retire, will receive all insurance benefits for life.

The last collective bargaining agreement between Wheelabrator and UAW Local 995, which covered active and retired production and maintenance employees, was effective from September 24, 1985 to September 24, 1988. The last agreement between Wheelabrator and UAW Local 5 covering active and retired research and development employees was effective from January 6, 1986 to December 1, 1988. Article 14, Section 5 of each agreement provided for hospital and surgical insurance coverage for employees who retired before January 1, 1986. Like the 1965 agreement, this section stated that employees who retired since September 22, 1959 would have the full cost of their Blue Cross-Blue Shield coverage paid after attaining age 65 and provided for a Medicare supplement to provide benefits equal to those provided for active and retired employees age 65 and over. The supplemental benefits were to be continued for the spouse after the death of the retiree. In addition to this provision, the agreement had a separate provision for health insurance coverage for employees who retired after January 1, 1986, which provided a vesting schedule and stated that, "This coverage will be provided to the retiree and spouse at no

cost for life." No such statement appeared in the provision for employees retiring before 1986.

On March 1, 1989, Wheelabrator reduced the health insurance benefits for its pre-1986 retirees. Wheelabrator's president issued a letter dated February 9, stating in part:

> As you know, the union contract in effect when you or your spouse retired provided you with the same health insurance benefits available to active employees of The Wheelabrator Corporation. That contract has now expired. . . .
>
> First, the medical plan will include deductibles and coinsurance payments that apply to all expenses including prescription drugs. . . . Second, we have had to eliminate the dental, vision, and hearing benefits.

An attachment to this letter set forth the comparison of the new and old insurance plans. The deductible was doubled, the maximum benefit rose from $150,000.00 per insured to $500,000.00 per insured, and the percentage of the costs paid decreased from 100% to 80%, with many types of costs requiring a deductible for the first time. An out-of-pocket maximum of $1,200.00 per individual or $2,400.00 per family was added to the plan. The summary plan description outlining the coverage stated that, "The Wheelabrator Corporation may terminate, suspend, withdraw, amend, or modify the Plan in whole or in part at any time."

II.

The retirees and their spouses bring this class action seeking restoration of benefits, damages for lost benefits, medical expenses incurred due to lost benefits, damages for mental distress, costs, and attorney fees.

A.

Count I of their complaint alleges that Wheelabrator breached its collective bargaining agreement in violation of the LMRA because the collective bargaining agreement gave retirees and their spouses a life-long right to insurance benefits that were not to be reduced. Wheelabrator contends that the court lacks subject matter jurisdiction over the claim in Count I, and that Count I fails to state a claim because the agreements under which Count I is brought expired by their own terms in 1988 before Wheelabrator changed the retirees' benefits.

As to Count I, Wheelabrator contends that the action under the LMRA should be dismissed because the contracts on which is it based expired by their own terms before the action accrued. The LMRA provides in part:

> Suits for violation of contracts between an employer and a labor organization . . . may be brought in any district court of the United States having jurisdiction of the parties. . . .

29 U.S.C. § 185(a).

Most of the parties' arguments presented addressed the summary judgment motions. Wheelabrator did argue that this court lacks jurisdiction of the LMRA claim in Count I and Count I fails to state a claim because of the

expiration of the agreements, but the court has not found in the cases upon which Wheelabrator relies a holding that an LMRA action should be dismissed pursuant to Fed. R. Civ. P. 12(b)(l) or 12(b)(6) because of the expiration of the agreements. It appears that the determination of the parties' intent as to the duration of the collective bargaining agreements' terms is more properly made in a summary judgment motion than a motion to dismiss. Further, paragraphs 11 and 12 of the amended complaint allege that Wheelabrator was obligated to provide retirees the same level of benefits for life. Therefore, Count I should not be dismissed for failure to state a claim.

B.

Count II alleges that Wheelabrator violated ERISA by failing to administer their employee welfare benefit plans according to their terms and by breaching its fiduciary duty with respect to the benefit plans and participants. Wheelabrator claims entitlement to judgment as a matter of law because the plaintiffs cannot show that Wheelabrator was required to provide the same level of benefits to the retirees for life, and it is undisputed that Wheelabrator did not waive its flexibility to alter the benefit plans.

Wheelabrator also claims that the plaintiffs are not entitled to attorney fees under Count I as a matter of law nor to a jury trial on any claim in the complaint. Finally, Wheelabrator asks that the demand for extracontractual damages be stricken.

C.

The plaintiffs seek summary judgment on the issue of liability on both Counts I and II. Because their motion addresses the same issues as the defendant's summary judgment motions, the court will discuss the arguments presented in the cross-motions together.

For the reasons that follow, the court concludes that Wheelabrator is entitled to summary judgment as a matter of law on both Counts I and II, rendering unnecessary any further discussion of the jury demand, attorney fees, and extracontractual damages.

III.

A party seeking summary judgment must demonstrate that no genuine issue of fact exists for trial and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Certain Underwriters of Lloyd's v. General Accident Ins. Co. of America*, 909 F.2d 228, 231 (7th Cir. 1990). If that showing is made and the motion's opponent would bear the burden at trial on the matter that forms the basis of the motion, the opponent must come forth with evidence to show what facts are in actual dispute. *Lujan v. National Wildlife Federation*, 110 S. Ct. 3177, 3186 (1990); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Sims v. Mulcahy*, 902 F.2d 524, 540 (7th Cir.), *cert. denied* 111 S. Ct. 249 (1990). If he fails to do so, summary judgment is proper. *Fitzpatrick v. Catholic Bishop of Chicago*, 916 F.2d 1254, 1256 (7th Cir. 1990); *Tatalovich v. City of Superior*, 904 F.2d 1135, 1142 (7th Cir. 1990). A genuine factual issue exists only when there is sufficient evidence for a jury to return a verdict for the motion's opponent.

Harbor House Condominium Ass'n v. Massachusetts Bay Ins. Co., 915 F.2d 316, 320 (7th Cir. 1990); *Hines v. British Steel Corp.*, 907 F.2d 726, 728 (7th Cir. 1990). Summary judgment should be granted if no reasonable jury could return a verdict for the motion's opponent. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Visser v. Packer Engineering Associates, Inc.*, 924 F.2d 655, 660 (7th Cir. 1991).

The parties cannot rest on mere allegations in the pleadings, *McCarthy v. Kemper Life Ins. Companies*, 924 F.2d 683, 687 (7th Cir. 1991), or upon conclusory allegations in affidavits. *Mestayer v. Wisconsin Physicians Service Ins. Corp.*, 905 F.2d 1077, 1079 (7th Cir. 1990). The court must construe the facts as favorably to the non-moving party as the record will permit, *Soldal v. County of Cook*, 923 F.2d 1241, 1245 (7th Cir. 1991), and draw any permissible inferences from the materials before it in favor of the non-moving party, *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Illinois Bell Telephone Co. v. Hanes and Co., Inc.*, 905 F.2d 1081, 1087 (7th Cir. 1990), as long as the inferences are reasonable. *Bank Leumi Le-Israel, B.M. v. Lee*, 928 F.2d 232, 236 (7th Cir. 1991). The non-moving party must show that the disputed fact is material, or outcome-determinative, under applicable law. *Johnson v. Pelker*, 891 F.2d 136, 138 (7th Cir. 1989).

Even on an issue of intent, summary judgment is proper if the party with the burden at trial presents no indication of the necessary motive or intent. *Illinois Bell Telephone Co.*, 905 F.2d 1081, 1087 (7th Cir. 1990); *Holland v. Jefferson Nat'l Life Ins. Co.*, 883 F.2d 1307 (7th Cir. 1989).

The court will address the parties' motions with the above standards in mind.

IV.

Under ERISA, welfare benefit plans, such as the plans at issue in this case, are not subject to the stringent vesting, funding, and participation requirements of pension plans. 29 U.S.C. § 1051 *et seq.* Therefore, an employer may unilaterally amend to terminate a welfare benefit plan without violating ERISA. *Young v. Standard Oil (Indiana)*, 849 F.2d 1039 (7th Cir.), *cert. denied*, 488 U.S. 981 (1988). *See also Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488, 491 (2d Cir. 1988). Wheelabrator asserts that it retained the flexibility to amend its insurance plan as it saw fit insofar as the pre-1986 retirees' rights in the plan did not vest. For this reason, Wheelabrator claims that summary judgment should be entered as to Count II.

Wheelabrator relies on *Merk v. Jewel Companies, Inc.*, 848 F.2d 761, 763 (7th Cir.), *cert. denied*, 109 S. Ct. 393 (1988), which held that:

> The entitlements established by collective bargaining agreements do not survive their expiration or modification. So if, for example, the [prior] agreement had established a plan under which Jewel provided health benefits for its employees and retirees, the Union and Jewel would have been free to abolish those benefits for subsequent periods, even though the Union does not represent retirees. If the Union and Jewel had reached an impasse, Jewel would have been free to put into place its last proposal, which might not have included health benefits.

> *Anderson v. Alpha Portland Industries, Inc.*, 836 F.2d 1512 (8th Cir. 1988); *Bartman v. Allis-Chalmers Corp.*, 799 F.2d 311 (7th Cir. 1986); cf. *DeGeare v. Alpha Portland Industries, Inc.*, 837 F.2d 812 (8th Cir. 1988) (ERISA does not alter the rule of labor law in this respect). That the retirees had worked in earlier years in the expectation that they were receiving money today and health benefits later would not matter. Because of the time limit on the collective bargaining agreement, any subjective expectation they may have had is not enforceable.

The plaintiffs criticize Wheelabrator's reliance on dicta *Jewel Companies*, a case arising out of a company's unilateral wage reduction and not out of a modification of health care benefits. Although the language quoted is dicta, *Jewel Companies* stands for the proposition that entitlements established by collective bargaining agreements do not survive their expiration.

The plaintiffs ask the court to follow *UAW v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 1002 (1984), which held that whether retiree insurance benefits continued beyond the expiration of collective bargaining agreements depends upon the intent of the parties. The *Yard-Man* court stated that in discerning the parties' intent, the trial court should look first to the agreement's explicit language. When ambiguities exist, the court may look to other words and phrases in the agreement for guidance in ascertaining the parties' intent. Having no extrinsic evidence on the parties' intent, the court looked solely to the language of the collective bargaining agreement and found ambiguity in the section stating that:

> When the former employee has attained the age of 65 years then:
>
> (1) *The Company will provide insurance benefits equal to the active group benefits . . . for the former employee and his spouse.*

Yard-Man, 716 F.2d at 1480 (emphasis in text). Therefore, the court looked to other provisions in the agreement and concluded that the parties "intended to create vesting insurance benefits in the Yard-Man retirees which continue beyond the life of the collective bargaining agreement." 716 F.2d at 1481. The court reached this conclusion because other provisions for termination of benefits of active employees were explicitly stated and inapplicable to retirees. One provision limited the insurance coverage for the retiree's spouse and dependent children to the expiration of the collective bargaining agreement in the event of the retiree's death. Further, Yard-Man had continued to provide retirees with insurance benefits long after the plant closed, indicating that it did not consider retirees' benefits to be tied to the durational limits of the active employees. Although the court agreed with Yard-Man that "traditional rules of contractual interpretation require a clear manifestation of intent before conferring a benefit or obligation", it did not agree that "the duration of the benefit once clearly conferred is subject to this structure." *Yard-Man*, 716 F.2d at 1481 n.2.

As Wheelabrator argues, the Seventh Circuit has not adopted the *Yard-Man* approach to determining whether benefits conferred in collective bargaining agreements automatically vest upon retirement. Instead, the plaintiffs at all times bear the burden of showing that the parties

clearly intended that benefits would survive the collective bargaining agreement's expiration. In *UAW v. New Castle Foundry, Inc.*, 114 L.R.R.M. (BNA) 3589 (S.D. Ind. 1983), the court did not employ a burden-shifting approach like the one applied in *Yard-Man*:

> Plaintiff also cites a recent district court decision in which a rule of construction is adopted that creates a presumption in favor of vested retirement benefits in the absence of clear evidence indicating a contrary intention. . . . The effect of such a rule is to shift the burden of persuasion in cases such as the present one from plaintiff to defendant. However, even if the rule of [that case] is sound (an issue on which we express no opinion), the evidence of a "contrary intention" is sufficiently clear in the present case to require a decision for defendants.

New Castle Foundry, 114 L.R.R.M. (BNA) at 3591 (citation omitted). *See also Anderson v. Alpha Portland Industries, Inc.*, 836 F.2d 1512 (8th Cir. 1988), *cert. denied*, 489 U.S. 1051 (1989). Upon examining the intent expressed in the settlement agreement executed between the employer and union when the employer went out of business to pay retirees' life and health benefits, the *New Castle Foundry* court concluded that the agreement extended only to the termination of the collective bargaining contract. Some sections of the contract expressly provided for lifetime benefits. For example, surviving spouses of retirees were provided health insurance for life or until remarriage without regard to age. However,

> The phrase "for life" or similar language is absent from the other provisions . . . which describe health insurance coverage for retirees.

> The failure of the parties to employ the "for life" language . . . when referring to retirees indicates that the parties had no intention of providing benefits to those employees until death.

New Castle Foundry, 114 L.R.R.M. (BNA) at 3590.

District 17, UMW v. Allied Corp., 735 F.2d 121 (4th Cir. 1984), *reh'g en banc,* 765 F.2d 412, *cert. denied,* 473 U.S. 905 (1985), involved a master collective bargaining agreement between the United Mine Workers of America and the Bituminous Coal Operators Association which was renegotiated every three years. The National Bituminous Coal Wage Agreement of 1978 agreement provided that every employer would provide through its own insurance carrier health and other benefits for its own employees and retirees and stated: "The benefits provided pursuant to such plans shall be guaranteed during the term of this Agreement by each Employer at levels set forth in such plans." *Allied Corp.,* 735 F.2d at 126; *see id.* at n.6. The 1981 and 1984 contracts perpetuated this obligation. The 1978 agreement also obligated the employer, upon transferring its assets, to require purchasing companies to assume its obligations under the agreement. The employer sold its assets in 1980 without requiring the purchaser to assume its obligations. The district court issued an injunction requiring the original employer to continue providing the benefits to retired employees until the employer secured an agreement from its purchasers to assume those obligations. Finding that the collective bargaining agreement required the employer to pay health benefits only during the term of the contract and that the contract had expired, the Fourth Circuit initially reversed, holding that the employer did not violate the agreement by failing to pay

for additional benefits. The court stated that absent a clear intention of the parties, employer's obligations and employees' rights do not survive the expiration of the collective bargaining agreement. If the retirees relied on the employer's conduct and statements concerning benefit payments after its asserts [sic] were transferred, such reliance was not reasonable or detrimental in light of the retirees' knowledge of the provisions of the agreement. *Allied Corp.*, 735 F.2d at 130.

On rehearing, the Fourth Circuit affirmed the injunction, holding that the employer breached its collective bargaining agreement by agreeing with its successors that they would not assume the original employer's contractual obligations. Had the original employer not breached its agreement, its retirees probably would have received insurance coverage from its successors as long as they were in the business of mining coal because they would have been covered pursuant to the 1981 and 1984 agreements. The appropriate remedy, therefore, was to require the original employer to provide the coverage until it secured an obligation to provide coverage from its successors. *Allied Corp.*, 765 F.2d at 417-21.

District 29, UMW v. Royal Coal Co., 768 F.2d 588 (4th Cir. 1985), *appeal after remand*, 826 F.2d 280 (1987), *cert. denied*, 485 U.S. 935 (1988), was brought by retired and disabled miners and their widows alleging that either the coal company or its benefit plan and trust was obligated to provide them with life and health insurance coverage pursuant to the National Bituminous Wage Agreements of 1978 and 1981. During the term of the 1981 agreement, the employer ceased all active mining operations and did

not become a signatory to the 1984 agreement. The district court issued a preliminary injunction requiring the company to provide coverage to its retired and disabled employees, but the Fourth Circuit vacated the injunction and remanded the case for a determination of the benefit plan's obligation to provide the benefits. Unlike Allied, Royal Coal had ceased its operations and had not obligated itself to require a successor to provide benefits to its retirees. The Court noted that although the employer in *Allied Corp.* was liable for damages incurred as a result of its breach of contract, the majority and the dissent both seemed to agree that the employer's contractual obligation to provide benefits does not extend beyond the term of the agreements. Accordingly, the *Royal Coal* court held that the employer's obligation to provide insurance coverage did not extend beyond the expiration of its 1978 and 1981 wage agreements. *Royal Coal,* 768 F.2d at 590-92. *See also Schifano v. UMWA 1974 Benefits Plan and Trust.,* 655 F. Supp. 200, 204 (N.D. W. Va. 1987).

In *Williams v. Wellman Thermal Systems Corp.,* 684 F. Supp. 584, 593 (S.D. Ind. 1988), the court stated that the parties' intent controls the subject of continuation of the retirees' welfare benefits beyond the termination of the agreement, and "[i]f the parties clearly express their intent in their documents, no genuine issue of material fact would preclude a grant of summary judgment."

As in *Allied Corp.* and *Royal Coal,* the agreements on which this action is based expressed no clear intention of the parties that the employer would continue to provide insurance coverage after the expiration of the agreements. Moreover, the section of the 1985 agreement regarding benefits for Wheelabrator's post-1986 retirees

specifically provided for vesting of health care benefits for those retirees and stated that their coverage would be provided at no cost for life. The absence of any such provision in the section of the agreement covering benefits for pre-1985 retirees indicates that the parties did not intend to provide the same life-long benefit to that group. *See UAW v. New Castle Foundry, Inc.*, 114 L.R.R.M. (BNA) at 3590.

The plaintiffs also claim that the phrases, "after they attain sixty-five years of age", and, "shall be continued for the spouse after the death of the retiree", appearing in their collective bargaining agreements with Wheelabrator are "durational in nature" because they refer to the time the retirees will have benefits paid by the company. This construction of the language does not reflect the document's plain meaning, and the court cannot find from these phrases that Wheelabrator undertook to provide retirees the same level of health benefits for life. Further, the court finds no cases which require such a construction of these phrases.

Nothing in the plan documents states that the welfare benefits provided to pre-1986 retirees became fixed at retirement. Therefore, there is no presumption that these benefits vested upon retirement.

> The mere fact that employee welfare benefits continue into retirement does not indicate that the benefits become vested for life at the moment of retirement. No inference of an attempt to vest can be presumed from the fact that the benefits are retirement benefits. Indeed, the benefits at issue here are "retirement benefits" in a technical sense only. Unlike pension

> benefits, coverage under the welfare benefit plan does not begin at an employee's retirement. Rather, as plaintiffs themselves strenuously argue, the welfare benefits simply continue when an employee retires. Nothing in the documents establishes retirement as a vesting point.

Etherington v. Bankers Life and Casualty Co., 747 F. Supp. 1269, 1275-76 (N.D. Ill. 1990) (*quoting Howe v. Varity Corp.*, 896 F.2d 1107, 1110 (8th Cir. 1990)). The plaintiffs here contend that the welfare benefits they enjoyed as active employees continued for life because they continued into retirement. This continuation, however, cannot be presumed, but must instead be demonstrated by the parties' clearly expressed intent.

Wheelabrator also relies on *Ryan v. Chromalloy American Corp.*, 877 F.2d 598 (7th Cir. 1989), in which retirees sought, pursuant to ERISA and the LMRA, reinstatement of the welfare benefits that were terminated when their employer sold the division in which they had been employed. The court held that the plan documents provided for the right to terminate the plan if the employer's assets were sold, so termination of welfare benefits was permitted under ERISA. The court also held that under the collective bargaining agreements the benefits did not vest, so the retirees were not entitled to relief under the LMRA.

The trust documents governing the benefit program in *Chromalloy American* explicitly provided that,

> . . . if, among other things, the company were to sell "all or substantially all of the assets of an employer, then this trust shall be deemed terminated as respects the employees of such

> employer, unless provision is made whereby this trust will be continued by . . . [the] purchaser of all or substantially all of such assets."

877 F.2d at 600. Upon the retirees' failure to demonstrate that a genuine issue of fact existed as to whether all or substantially all of the employer's assets had been sold, the court granted summary judgment.

The plaintiffs note that the retirees were assured that they would have this benefit at the same level for life. Wheelabrator argues that the documents setting forth the agreement control and are unambiguous, and the plaintiffs therefore may not prove intent by extrinsic evidence.

Summary judgment is appropriate in cases involving interpretation of contractual documents.

> [S]ummary judgment should be entered only if the pertinent provisions of the contractual documents are unambiguous; it is the lack of ambiguity within the express terms of the contract that forecloses any genuine issue of material fact. . . . If a district court determines that the pertinent provisions of the contract are unambiguous, it need not consider extrinsic evidence. At that point, the district court should proceed to declare the meaning of those provisions. . . .

Chromalloy American, 877 F.2d at 602; *accord, Metalex Corp. v. Uniden Corp. of America*, 863 F.2d 1331, 1333 (7th Cir. 1988). In *Chromalloy American*, the court determined that this term was unambiguous and no extrinsic evidence was necessary. *See also Etherington v. Bankers Life and Casualty Co.*, 747 F. Supp. at 1276.

In *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488 (2d Cir. 1988), the court stated that absent a showing a [sic]

fraud, an ERISA welfare plan that is otherwise unambiguous is not subject to amendment by the informal communications between the employer and the beneficiaries. The court rejected the plaintiffs' argument that the welfare plan at issue became a lifetime benefit because of one summary plan description's failure to state that the employer may alter the welfare plan and because of the employer's filmstrips and other communications describing the plan as a "lifetime" benefit provided "at no cost".

> Congress intended that plan documents and the SPDs [summary plan descriptions] exclusively govern an employer's obligations under ERISA plans. This intention was based on a sound rationale. Were all communications between an employer and plan beneficiaries to be considered along with the SPDs as establishing the terms of a welfare plan, the plan documents and the SPDs would establish merely a floor for an employer's future obligations. Predictability as to the extent of future obligations would be lost, and, consequently, substantial disincentives for even offering such plans would be created.

Moore v. Metropolitan Life Ins. Co., 856 F.2d at 492.

ERISA requires that "[e]very employee benefit plan . . . be established and maintained pursuant to a written instrument." 29 U.S.C. § 1102(a)(1). "The writing requirement is a central feature of ERISA, not a mere technicality. It secures to the plan's participants and administrators a clear understanding of their rights and obligations." *Saret v. Triform Corp.*, 662 F. Supp. 312, 316 (N.D. Ill. 1986).

The informal communications between Wheelabrator and retiring employees should not be considered in determining Wheelabrator's obligations. Instead, the plan documents themselves must govern. While ERISA may permit parties to provide for vesting of welfare benefits, the court must look to the plan documents to see whether the parties have done so.

The plaintiffs argue that Wheelabrator incorrectly relies upon the insurance policies and the Master Operating Agreement to demonstrate its right to alter or terminate the retirees' benefits, whereas the collective bargaining agreements set forth Wheelabrator's obligations to its retirees. Wheelabrator argues that the collective bargaining agreements do not meet the requirements of 29 U.S.C. § 1102, but to the extent that they provide for benefits, they may be considered along with the formal plan documents. In *Ryan v. Chromalloy American Corp.*, 877 F.2d at 604, the court found the entry of summary judgment on both ERISA and LMRA claims appropriate based on the language of the group benefit program documents, the summary plan description and the collective bargaining agreements. *See also Musto v. American General Corp.*, 861 F.2d 897, 902-04 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989); *Etherington v. Bankers Life and Casualty Co.*, 747 F. Supp. at 1278-79.

In this case, an examination of the formal plan documents and the collective bargaining agreements reveals no intention on Wheelabrator's part to provide pre-1986 retirees the same level of benefits at no cost for life. The Master Operating Agreement explicitly reserved Wheelabrator's right to terminate the policy. None of the documents setting forth the agreements between Wheelabrator

and its employees show that Wheelabrator promised to provide the extent and duration of benefits the plaintiffs claim. The only references to the coverage the plaintiffs claim is found in communications – a document used at a union ratification meeting, letters to retirees from company officials, discussions between a union official and retiring employees – other than those documents that must govern this action. For this reason, the plaintiffs' LMRA and ERISA claims must fail and the defendant's motion for summary judgment should be granted as to Counts I and II. Because the court concludes that summary judgment should be granted in the defendant's favor, the issues raised in the defendant's motion regarding the plaintiffs' entitlement to attorney fees and extra-contractual damages need not be decided.

V.

For the foregoing reasons, the court hereby:

(1) GRANTS the defendant's motion for summary judgment;

(2) DENIES the defendant's motion to dismiss;

(3) DENIES the plaintiffs' motion for summary judgment; and

(4) DENIES as moot the defendant's motion to strike the jury demand.

SO ORDERED.

ENTERED: May 15, 1991

/s/ Robert L. Miller, Jr.
Robert L. Miller, Jr., Judge
United States District Court

cc: Macey
Leone
Woods/Pankow/Mysliwiec
Quillen/Christenson/Kresser
Order book

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF INDIANA

LAWRENCE J. ARNDT, et al

v.

THE WHEELABRATOR CORPORATION

JUDGMENT IN A CIVIL CASE

CASE NUMBER: S89-00360

_ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that plaintiffs take nothing and summary judgment is granted in favor of the defendant.

May 15, 1991
Date

RICHARD E. TIMMONS
Clerk

/s/ Karen L. Brickner
(By) Deputy Clerk

No. 93-85

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

THE WHEELABRATOR CORPORATION,
Petitioner,
v.
KENNETH P. BIDLACK, STANLEY DWORECKI, HELEN MARKER, HOWARD W. SNYDER and ZELMA WESCO, on behalf of themselves and all others similarly situated,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF THE AMERICAN AUTOMOBILE MANUFACTURERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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---

MOTION FOR LEAVE TO FILE BRIEF FOR THE AMERICAN AUTOMOBILE MANUFACTURERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The American Automobile Manufacturers Association (the "AAMA") respectfully moves the Court for leave to file a brief *amicus curiae* in support of the Petitioner, The Wheelabrator Corporation.

This case involves the right of an employer to modify retiree health benefits under the Employee Retirement Income Security Act of 1974 and the National Labor Relations Act, and the right of an employer to rely on the terms embodied in its health care plan documents and collective bargaining agreements to determine its obligations to retirees. The AAMA has an interest in this case because members of the AAMA have extensive experience in designing and administering health care plans for millions of employees. Because of this significant involvement in health plans, the AAMA has a special interest in the legal development of health care administration in general, and in the Seventh Circuit's decision in *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603 (7th Cir. 1993), in particular. The "weak no-vest rule" applied in *Bidlack* in determining whether collectively bargained retiree health benefits have vested will create uncertainty in many instances concerning the duration of such benefits, often resulting in costly litigation, and will deprive employers and unions alike of the flexibility needed to deal with the rising cost of health care. Participation of the AAMA in this petition will assist the Court so that it may have the benefit of the fullest discussion on these and other issues germane to health care administration and design.

Undersigned counsel for the AAMA has obtained consent to the filing of this brief from each of the parties pursuant to Supreme Court Rule 37.2. As of the date of printing, however, written acknowledgement of consent had not been received from Counsel for Respondents. Out of an abundance of caution, the AAMA seeks leave from the Court to file its brief in support of the Petition.

WHEREFORE, the AAMA moves that this Court allow the filing of the "Brief of the American Automobile Manufacturers Association as Amicus Curiae in Support

of the Petition for a Writ of Certiorari," which is submitted herein with the requisite number of printed copies.

Respectfully submitted,

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August 16, 1993

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
REASONS FOR GRANTING THE WRIT	4
I. IT IS IMPORTANT FOR THE COURT TO DEVELOP A UNIFORM RULE WHICH REDUCES THE UNCERTAINTY ASSOCIATED WITH THIS CRITICAL ISSUE	4
II. THE RULE ADOPTED BY THE SEVENTH CIRCUIT IGNORES THE PRINCIPLES OF ERISA AND THE NLRA, CREATES UNCERTAINTY, AND WILL LEAD TO INCREASED LITIGATION CONCERNING AN EMPLOYER'S POSTRETIREMENT MEDICAL OBLIGATIONS	5
A. The Rule Adopted By the Seventh Circuit Permits Quick Resort to Extrinsic Evidence	5
B. ERISA Does Not Require the Vesting of Welfare Benefits	6
C. As Permissive Subjects of Bargaining, Retiree Health Benefits Do Not Survive the Expiration of a Collective Bargaining Agreement Under the NLRA	7
D. In Order to Establish an Ambiguity, Plaintiffs Should Be Required to Show That the Plan Documents and the Collective Bargaining Agreement Contain Inconsistent Provisions	8

TABLE OF CONTENTS—Continued

Page

III. THE RULE ADOPTED BY THE SEVENTH CIRCUIT WILL MEAN THAT IN VIRTUALLY EVERY CASE, THE DURATION OF COLLECTIVELY BARGAINED RETIREE WELFARE BENEFITS WILL BE UNCLEAR UNLESS AND UNTIL LITIGATED 9

IV. EMPLOYERS AND UNIONS NEED FLEXIBILITY TO DEAL WITH THE RISING COST OF HEALTH CARE 11

CONCLUSION 16

TABLE OF AUTHORITIES

FEDERAL CASES — Page

Admiral Retread Equipment Co., NLRB Gen. Counsel Advice Mem., Case No. 8-CA-16577, 114 LRRM 1277 (1983) 7

Allied Chemical & Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971) 7

Bidlack v. Wheelabrator Corp., 993 F.2d 603 (7th Cir. 1993) 2, 3, 5, 6, 8

Litton Financial Printing Division v. NLRB, —— U.S. ——, 111 S. Ct. 2215 (1991) 7

Metropolitan Life Insurance Co. v. Massachusetts, 471 U.S. 724 (1985) 6

Moore v. Metropolitan Life Insurance Co., 856 F.2d 488 (2nd Cir. 1988) 6

NLRB v. Katz, 369 U.S. 736 (1962) 7

National Electrical Contractors Association, 277 NLRB 397 (1985) 10

Ryan v. Chromalloy, 877 F.2d 598 (7th Cir. 1989) .. 6

Senn v. United Dominion Industries, Inc., 951 F.2d 806 (7th Cir. 1992), *cert. denied*, 61 U.S.L.W. 3851 (June 21, 1993) 10

Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983) 6

FEDERAL STATUTES

Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§ 1001 *et seq.* 3, 8

29 U.S.C. § 1051 6

29 U.S.C. § 1081(a) 6

National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.* 3, 6, 7, 8

MISCELLANEOUS

National Center for Health Statistics, *Health, United States, 1991* (Public Health Service Pub. No. 92-1232) 11, 12

Financial Accounting Standards Board, Statement of Financial Accounting Standards No. 106, "Employers' Accounting for Postretirement Benefits Other Than Pensions," December 1990.. 12, 13

IN THE

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF OF THE AMERICAN AUTOMOBILE MANUFACTURERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

INTEREST OF THE AMICUS CURIAE

The American Automobile Manufacturers Association (the "AAMA") is a nonprofit membership association composed of American companies engaged in the manufacture of motor vehicles in the United States. The members of the AAMA are Chrysler Corporation, Ford Motor Company and General Motors Corporation. The activities of the AAMA include research projects, economic studies, collections of historical facts and figures, legal analyses and statistical compilations. Information gained

from these activities is communicated to legislators, government officials, educators, news media and the public. The principal purposes of the AAMA are the promotion of the national goals of individual freedom, mobility and an improved standard of living.

The issues raised in this case involve the right of an employer to modify retiree health benefits under the Employee Retirement Income Security Act of 1974 and the National Labor Relations Act, and the right of an employer to rely on health care plan documents to determine its rights and obligations to retirees. The members of the AAMA have extensive experience in designing and administering health care plans for millions of employees, dependents and retirees. Because of this significant involvement in health plans, the AAMA has a special interest in the legal development of health care administration in general, and in the Seventh Circuit's decision in *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603 (7th Cir. 1993), in particular. The "weak no-vest rule" applied in *Bidlack* in determining whether collectively bargained retiree health benefits have vested will create uncertainty in many instances concerning the duration of such benefits, often resulting in costly litigation, and will deprive employers and unions alike of the flexibility needed to deal with the rising cost of health care. Participation of the AAMA in this petition will assist the Court so that it may have the benefit of the fullest discussion on these and other issues germane to health care administration and design.

SUMMARY OF ARGUMENT

The question of when and under what conditions collectively bargained retiree health insurance benefits become vested, and thus survive the expiration of the agreements creating them, is currently one of the most important issues affecting employers, unions, and retirees. Due to the significance of this issue, it is imperative that the courts develop a uniform rule for determining an

employer's future committment for postretirement medical benefits that provides certainty as to the rights and obligations of each party, while also conforming to the established principles of labor and benefits law.

Unfortunately, the Seventh Circuit's decision in *Bidlack* fails to achieve these objectives. By allowing overly quick resort to extrinsic evidence, the rule adopted by the Seventh Circuit focuses attention away from the language contained in the official plan documents and the collective bargaining agreements creating such benefits. This violates the basic tenets of both the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*, and the National Labor Relations Act (the "NLRA"), 29 U.S.C. §§ 151 *et seq.*, which place primary emphasis on the language embodied in the official plan documents and the collective bargaining agreements. ERISA purposefully rejects mandatory vesting of medical benefits, whether for active or retired employees, and under the NLRA, permissive subjects of collective bargaining (which include retiree health benefits) only survive expiration of a collective bargaining agreement if the employer has expressly obligated itself to continue such benefits. Thus, postretirement medical benefits do not vest unless the plan documents and the collective bargaining agreements, when viewed together, provide for such vesting, and a court should not look outside these documents to extrinsic evidence unless the written documents contain an internal inconsistency concerning vesting.

Retention of the rule adopted by the Seventh Circuit would seriously undermine the predictability of an employer's liability for retiree health obligations. As such, it would increase litigation over such benefits and discourage employers from providing such benefits in the first place. The resulting uncertainty would also deprive employers and unions of the flexibility they need to deal with the rising cost of health care in a manner that maximizes the benefits and minimizes the costs for both active

employees and retirees. Therefore, because of the need to develop a uniform rule that provides certainty to employers, unions, and retirees concerning an employer's ability to modify or terminate collectively bargained retiree health benefits following expiration of the collective bargaining agreement, the Court should grant the petition for a writ of certiorari in this case.

REASONS FOR GRANTING THE WRIT

I. IT IS IMPORTANT FOR THE COURT TO DEVELOP A UNIFORM RULE WHICH REDUCES THE UNCERTAINTY ASSOCIATED WITH THIS CRITICAL ISSUE.

The question of if and when collectively bargained retiree health insurance benefits vest, and thus whether such benefits continue beyond the expiration of the collective bargaining agreement under which they were initially provided, is currently one of the most important issues in the field of labor relations. This issue has become especially important over the past decade as the costs of health care have skyrocketed upward. Because union employees make up a large segment of the nation's industrial workforce, and because increasingly large numbers of American workers are expected to enter into retirement in the years ahead, resolution of this difficult and complex issue will have an increasingly significant impact upon our nation's economy.

As a result of the tremendous impact any resolution of this issue will have upon employers, unions, and both active and retired employees, it is important that the courts fashion a uniform rule for resolving this issue that is fair and equitable to employers, unions, and retirees and that provides certainty as to the rights and obligations of each party, thereby precluding the need for costly litigation, while also comporting with the long-standing principles of labor and benefits law. Unfortunately, the courts have been unable to develop a uniform rule which achieves each of these objectives. The decision of the

Seventh Circuit is indicative of the confusion and uncertainty experienced by the courts in addressing this issue. If the writ is not granted, this confusion and uncertainty will continue, to the detriment of employers, employees, and unions alike.

II. THE RULE ADOPTED BY THE SEVENTH CIRCUIT IGNORES THE PRINCIPLES OF ERISA AND THE NLRA, CREATES UNCERTAINTY, AND WILL LEAD TO INCREASED LITIGATION CONCERNING AN EMPLOYER'S POSTRETIREMENT MEDICAL OBLIGATIONS.

A. The Rule Adopted By the Seventh Circuit Permits Quick Resort to Extrinsic Evidence.

The Seventh Circuit was unable to reach a majority view concerning the rule to be applied by a court in determining whether collectively bargained retiree health benefits have vested. The lead opinion decided upon a rule (termed the "weak no-vest rule" by the concurring opinion) which holds that if a collective bargaining agreement is ambiguous with respect to vesting, resort to extrinsic evidence is proper to determine the intent of the parties. However, if such extrinsic evidence fails to show by a preponderance of the evidence that the parties intended the benefits to vest, the presumption is that they did not.

Having settled on this rule, the lead opinion then proceeded to analyze the relevant language contained in the collective bargaining agreements at issue. After identifying what it perceived to be the relevant provisions, the lead opinion characterized them as providing "that once retired employees reach the age of 65 the company will pick up the full tab for their health insurance and that when they die their spouses will continue to receive supplemental health benefits, again at the company's cost." *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603, 608 (7th Cir. 1993). Declaring that "[t]his could be thought a promise to retired employees that they and their spouses will be covered for the rest of their lives," the lead opin-

ion labeled the agreements as "vague" and therefore determined that resort to extrinsic evidence was proper. *Id.*

This quick resort to extrinsic evidence foreshadows the uncertainty likely to be created by the Seventh Circuit's decision and the onslaught of litigation that is likely to follow in its wake. Essentially, the rule adopted by the Seventh Circuit allows a tribunal to pick out one or two sentences from a typically complex and lengthy labor agreement or plan document, hypothesize that these sentences are potentially subject to more than one interpretation, and immediately entertain an examination of extrinsic evidence to determine the supposed intent of the parties. Such an analysis does not do justice to the powerful bodies of law which have developed under ERISA and the NLRA, and ignores the context in which such agreements are drafted.

B. ERISA Does Not Require the Vesting of Welfare Benefits.

Both the statutory language and case law interpreting ERISA make clear that, in contrast to the rules for pension benefits, ERISA does not require the vesting of welfare benefits. 29 U.S.C. §§ 1051, 1081(a). *See also Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91 (1983); *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 732 (1985). The reason Congress rejected automatic vesting of welfare benefits is that it realized the need of employers paying these benefits to have flexibility in modifying them, and because the costs of such plans are subject to fluctuating and unpredictable variables. *Moore v. Metropolitan Life Insurance Co.*, 856 F.2d 488, 492 (2nd Cir. 1988).

ERISA allows the *parties* to a welfare benefit plan to provide in the plan document that such benefits are subject to vesting requirements. *See Ryan v. Chromalloy*, 877 F.2d 598 (7th Cir. 1989). But absent such agreement by the parties, the *statutory* default rule under

ERISA remains that health and welfare benefits do not vest upon an employee's retirement.

C. As Permissive Subjects of Bargaining, Retiree Health Benefits Do Not Survive the Expiration of a Collective Bargaining Agreement Under the NLRA.

Under precedents of the NLRA, each provision of a collective bargaining agreement expires with the expiration of the agreement. *Litton Financial Printing Division v. NLRB*, —— U.S. ——, ——, 111 S. Ct. 2215, 2226 (1991). Nonetheless, certain terms and conditions of employment in existence prior to the agreement's expiration continue in effect after its expiration in order to maintain the *status quo* pending a bargaining impasse or resolution. *See generally, id.* at ——, 111 S. Ct. at 2225-26; *NLRB v. Katz*, 369 U.S. 736, 743-47 (1962). These specific terms and conditions of employment that continue are the "mandatory" subjects of bargaining that were embodied in the expired agreement. Such terms and conditions continue by *operation of law* (*i.e.*, the NLRA) and *not* by contract. These terms and conditions are imposed under the NLRA; but such terms and conditions are not in the nature of contract rights. *See Litton Financial Printing Division*, —— U.S. at ——, 111 S. Ct. at 2225-26.

In contrast to the mandatory subjects of bargaining, the "permissive" subjects of bargaining that were embodied in the expired agreement do not continue. Permissive subjects of bargaining may be changed unilaterally by the employer. *See generally Allied Chemical & Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 183-88 (1971); *Admiral Retread Equipment Co.*, NLRB Gen. Counsel Advice Mem., Case No. 8-CA-16577, 114 LRRM 1277 (1983). Retiree benefits are considered a permissive subject of bargaining. *Pittsburgh Plate Glass Co.*, 404 U.S. at 176-82. Thus, under the NLRA, an employer may unilaterally change retiree benefits upon the expiration of a collective

bargaining agreement, absent a contrary obligation created by contract. It is left to determine whether the employer has contractually obligated itself in the agreement to not unilaterally alter such benefits following expiration of the agreement.

D. In Order to Establish an Ambiguity, Plaintiffs Should Be Required to Show That the Plan Documents and the Collective Bargaining Agreement Contain Inconsistent Provisions.

The primary focus under both ERISA and the NLRA is on the terms contained in written documents—under ERISA, it is the official plan documents, and under the NLRA, it is the terms embodied in the collective bargaining agreement. The rationale for this shared emphasis on written documents is the need to create certainty among all of the parties as to their respective rights and obligations. Recourse to extrinsic evidence is envisioned only as a last resort.

Based on this paramount interest in creating certainty, a more appropriate view is that no ambiguity exists, and therefore no extrinsic evidence is admissible, unless the official plan documents and the collective bargaining agreement, when considered together, contain an internal inconsistency as to whether the parties intended for retiree health benefits to vest for life upon retirement. The Seventh Circuit explicitly recognized that if the documents are silent with regard to the vesting of retiree benefits, resort to extrinsic evidence is improper. *Bidlack,* 993 F.2d at 608 ("If . . . the collective bargaining agreements in this case were completely silent on the duration of health benefits for retired employees, then since . . . nothing in the structure of the agreements required that the duration be perpetual, we would not allow extrinsic evidence to show that those employees have a perpetual entitlement."). This result should not change merely because the collective bargaining agreements contain arguably vague statements as to the duration of retiree welfare

benefits. The statement that "nothing in the structure of the agreement *require*[*s*] that the duration be perpetual" still applies in such situations, especially if, as in this case, the employer has clearly and unequivocally reserved in the insurance contract that serves as the plan document its right to amend or terminate the benefits provided under the plan. In such cases, the agreement between the employer and the union is clear, and a court has no need to look to extrinsic evidence to determine the parties' bargain. Thus, courts should be reluctant to admit extrinsic evidence unless the plaintiffs can demonstrate an ambiguity based upon the existence of an internal inconsistency in the plan documents and the collective bargaining agreement when viewed in conjunction with each other.

III. THE RULE ADOPTED BY THE SEVENTH CIRCUIT WILL MEAN THAT IN VIRTUALLY EVERY CASE, THE DURATION OF COLLECTIVELY BARGAINED RETIREE WELFARE BENEFITS WILL BE UNCLEAR UNLESS AND UNTIL LITIGATED.

Retention of the rule adopted by the Seventh Circuit will seriously undermine the predictability of an employer's liability for retiree health obligations. Employers will be severely hindered in their ability to amend or modify their retire health obligations in most cases, because an employer can never be totally sure based on an examination of the terms of its plan documents and collective bargaining agreements whether a court will consider provisions in these documents to be "vague" or "ambiguous." Moreover, an employer will be unwilling to risk the introduction of extrinsic evidence to determine the intent of the parties because an employer can never be sure what communications each of its employees may have made to active employees and retirees throughout the term of the collective bargaining agreement. By the same token, the union will be unable to fairly represent its members, because it cannot be sure of the bargain it has struck for active employees and retirees. It cannot bargain to change

a vested benefit. The result will be that neither the employer nor the union can be certain of the employer's obligation for retiree health benefits unless and until the issue has been litigated. Clearly this is an untenable result and not the outcome envisioned by Congress.

The failure to adopt a more definite rule will render uncertain the scope of any provision dealing with a permissive subject of bargaining. In effect, the message to employers will be that whenever they agree to provide retiree benefits (a permissive subject of bargaining), they risk having their agreement "interpreted" well beyond the scope of the limited rights relinquished by the specific language of the agreement. The consequence of such a message likely will be that employers will cease negotiating over retiree benefits. The consequences in turn of a hesitancy to negotiate over retiree benefits is that it will remove some very substantial benefits from the collective bargaining process.[1]

By contrast, what is needed is a more definite rule that respects federal labor law's presumption that the employer retains all rights regarding permissive subjects except those expressly relinquished and that, at the same time, provides some certainty in collective bargaining over such subjects. In our opinion, the rule previously adopted by the Seventh Circuit in *Senn v. United Dominion Industries, Inc.*, 951 F.2d 806, 816 (7th Cir. 1992), *cert. denied*, 61 U.S.L.W. 3851 (June 21, 1993), meets these objectives. The rule adopted in *Senn* essentially states that unless a collective bargaining agreement contains explicit language providing for the vesting of retiree health and welfare benefits, such benefits are deemed to

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[1] Unlike mandatory subjects of bargaining, a union cannot exert economic pressure upon an employer to agree to a permissive subject of bargaining. For example, a union cannot insist to impasse or strike over a permissive subject of bargaining. *See, e.g., National Electrical Contractors Association*, 277 NLRB 397 (1985).

terminate upon expiration of the collective bargaining agreement. The result of such a rule would be that employers will continue to negotiate over permissive subjects like retiree benefits—certainly a desirable objective from the standpoint of national welfare policy.

IV. EMPLOYERS AND UNIONS NEED FLEXIBILITY TO DEAL WITH THE RISING COST OF HEALTH CARE.

Adoption of a more definite rule such as the *Senn* rule would also provide employers currently paying retiree welfare benefits with the flexibility they need to deal with the rapid rise in the cost of health care in a manner beneficial to both active employees and retirees. Collective bargaining between unions and employers has existed for over fifty years. During that time, the collective bargaining process has changed dramatically in response to social and economic developments. These changes are especially pronounced with respect to health and welfare benefits for retirees.

For many years, retiree welfare benefits received little attention in the bargaining process. Employers who chose to pay for such benefits did not encounter a significant drain on their assets, and most retirees that did not receive medical coverage from their former employer could afford to pay for their own health insurance. Often, retiree health care coverage for the term of a collective bargaining agreement was "thrown-in" by the employer as a minor concession in order to finalize the agreement. During the past ten years, however, the cost of health care has risen sharply. Based on 1982-84 dollars, the Consumer Price Index (CPI) for medical care was 162.8 in 1990, compared with 130.7 for all expenditures.[2] National health expenditures as a percentage of gross national product have risen from 4.5% in 1950 to 12.2%

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[2] National Center for Health Statistics, *Health, United States, 1991*, p. 270 (Public Health Service Pub. No. 92-1232).

in 1990,[3] while the gross national product has itself steadily risen over this period. The total employer and other private funds spent on health care rose from $9.2 billion in 1950 to $383.6 billion in 1990, and the per capita amount has increased from $58 in 1950 to $1,478 in 1990.[4] Certainly employers that once agreed to pay for retiree medical care, as well as the unions which negotiated for such promises, never foresaw this tremendous increase in the cost of health care.

Further compounding the problems faced by employers that pay for retiree medical care is the adoption by the Financial Accounting Standards Board of Statement of Financial Accounting Standards No. 106, "Employers' Accounting for Postretirement Benefits Other Than Pensions" ("FAS 106").[5] FAS 106 will have a dramatic and adverse effect on the financial statements of many companies. It is unclear what effect such accounting will have on the bond ratings of such companies by Moody's and Standard & Poor's. However, the result may be that the costs of obtaining credit will go up for companies with significant retiree health obligations under the new rule.

Another factor impacting upon the retiree health obligations of American companies is the emergence of a more global economy. American companies are now facing far greater competition from foreign firms than they did just two or three decades ago, when many of these companies first began bargaining over retiree health

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[3] *Health, United States, 1991*, p. 266.

[4] *Health, United States, 1991*, p. 274.

[5] Previously, most companies followed cash accounting for postretirement welfare benefit obligations, meaning these companies needed only report as an expense their current costs for the period. FAS 106, however, which was issued in December 1990 and is generally effective for fiscal years beginning after December 15, 1992, requires employers to begin following accrual accounting for such liabilities, thereby requiring them to record a liability for such future obligations.

care. Most foreign companies have no liabilities for retiree health care because these amounts are subsidized by their respective governments. This makes it extremely difficult for American companies to manufacture products that are competitively priced with similar goods manufactured by foreign competitors. The ability of American companies to continue to survive and compete against this onslaught of cheap foreign labor is dependent upon the ability of these companies to modify their retiree health obligations in future collective bargaining agreements and to work in conjunction with unions to develop health care packages that provide adequate protection to active employees and retirees without unduly burdening the employers.

Given the tremendous increase in the cost of health care, the requirements of FAS 106 and the threat of foreign competition, American companies must be allowed to redesign health and welfare plans to maximize the benefits and minimize the costs for both active employees and retirees. Tremendous opportunities exist for lowering the health care costs currently experienced under traditional indemnity plans. For example, a company might realize significant cost savings by switching from a simple indemnity program to a comprehensive system of managed health care. Similarly, by hiring their own doctors and building their own medical facilities, companies might also be able to cut health care costs. Finally, by sharing expenses with active employees and retirees through the use of copayments and deductibles, companies could allow free-market forces to play a more effective role in containing increasing health care costs without cutting needed benefits. Because employees and retirees would be undertaking a portion of these costs, they would have a shared incentive to avoid excessive or unnecessary expenditures.

In order to capitalize on such cost-saving opportunities, however, employers and unions must be able to quickly determine the ability of the employer to amend or modify the health benefits currently being paid to existing collectively-bargained retirees. Without a more definite rule by which companies can assess their ability to modify their current benefit structure, they will be locked into the status quo unless they are willing to risk the threat that a costly lawsuit will accompany any such modifications. If companies and unions have no flexibility with regard to existing retirees, they will be forced to diminish health care costs (or other wages and benefits) for existing employees (and future retirees). In effect, this will mean a windfall for the current generation of retirees at the expense of future generations of retirees. Every company has a limited number of dollars that it can pay for health care for its employees, both former and active. More benefits for current retirees means less benefits for active employees, both now and after they retire. Thus, if employers and unions are not permitted to modify the benefits for existing retirees, it will lead to even greater reductions in the benefits for active employees.

A more definite rule that retiree health benefits provided under a collective bargaining agreement cease automatically upon expiration of the agreement unless the employer has expressly obligated itself to pay such benefits for the lifetimes of its retirees, would avoid these problems, because unless the employer has contractually obligated itself to continue providing health and welfare benefits, the employer would know that its obligation to provide such benefits to retirees ceases upon the expiration of the collective bargaining agreement. The employer and union could then bargain on a new package of retiree welfare benefits, at which point they could take into account changes in the marketplace which have occurred since reaching their last agreement. Thus, under

a more definite rule, once the parties reach an agreement, they will both know exactly what they have agreed upon, and they will know that their agreement is for a definitive term. The employer will have some idea of the extent of its future obligations, and the union will be able to inform its members with certainty as to the extent of their benefits.

If, however, the rule adopted by the Seventh Circuit is retained, then employers and unions will be deprived of the necessary flexibility to bargain comprehensively with regard to maintaining a decent health and welfare benefits program for the existing workforce, while continuing to provide sufficient benefits to retirees, and at the same time keeping the costs faced by the employer for such benefits at a manageable level. Instead, employers will be locked into continuing to provide benefits to current retirees that are based on outdated assumptions and market conditions. In some instances, these obligations can represent a significant portion of a company's available working capital. For instance, in many of the rust belt industries, the ratio of retirees to current employees is as high as three to one. Vesting welfare benefits for the lifetimes of all these retirees would saddle these companies with a massive burden. This could result in a loss of jobs for current workers and, in a worst case scenario, could even force a company out of business. Courts should not impose such a liability on a company unless the company has clearly expressed an intent to continue to provide such benefits following expiration of the collective bargaining agreement.

Moreover, if the rule adopted by the Seventh Circuit is retained, unions will not work with employers to develop innovative ways of balancing the needs of current employees and retirees, because they will have a disincentive to bargain the issue in light of the leverage provided them by the employers' fear of litigation if the benefits

currently being provided are modified. Additionally, given the uncertainty over whether a court would deem these benefits vested for life, unions may be concerned as to their authority to bargain with respect to such benefits. Employers will thus be forced to provide for ever diminishing benefits for their active employees, or else diminish their cash compensation. Employers cannot just pass these increased costs on to their consumers because, among other reasons, foreign competitors are not burdened by such costs, and because employers without union employees would not face such difficulties in amending or modifying retiree welfare benefits. For these reasons, the Court should grant the writ and establish a uniform rule that provides certainty concerning the vesting of collectively bargained retiree health and welfare benefits.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari in the instant case so that a uniform rule can be developed that provides certainty to employers, unions, and retirees concerning the employer's ability to modify or terminate collectively bargained retiree health benefits following expiration of the collective bargaining agreement.

Respectfully submitted,

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August 16, 1993

No. 93-85

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

THE WHEELABRATOR CORPORATION,
Petitioner,

v.

KENNETH P. BIDLACK, STANLEY DWORECKI, HELEN MARKER, HOWARD W. SNYDER and ZELMA WESCO, on behalf of themselves and all others similarly situated,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	4
I. THE SEVENTH CIRCUIT'S DECISION IS NOT IN CONFLICT WITH THE SUPREME COURT'S DECISION IN *LITTON FINANCIAL PRINTING DIVISION v. NLRB*	4
II. THE SEVENTH CIRCUIT'S DECISION IS NOT IN CONFLICT WITH THE DECISION OF ANY OTHER CIRCUIT	8
III. THE SEVENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH ANY IMPORTANT FEDERAL POLICY	11
CONCLUSION	13

TABLE OF AUTHORITIES

Cases	Page
American Construction Co. v. Jacksonville T. & K.R. Co., 148 U.S. 372 (1893)	11
Anderson v. Alpha Portland Industries, Inc., 836 F.2d 1512 (8th Cir. 1988), *cert. denied sub nom, Anderson v. Shattery Group, Inc.*, 489 U.S. 1051 (1989)	8
Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251 (1916)	11
Litton Financial Printing Division v. NLRB, —— U.S. ——, 111 S.Ct. 2215, 115 L.Ed.2d 177 (1991)	4, 5, 6, 7, 8
Ryan v. Chromalloy American Corp., 877 F.2d 598 (7th Cir. 1989)	10, 12
Senn v. United Dominion Industries, Inc., 951 F.2d 806 (7th Cir. 1992), *cert. denied* 61 U.S.L.W. 3848 (June 21, 1993)	9-10
Smith v. ABS Industries, Inc., 890 F.2d 841 (6th Cir. 1989)	8
UAW v. Yard-Man, Inc., 716 F.2d 1476 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984)	8
UFCW Local 105-A v. Dubuque Packing Co., 756 F.2d 66 (8th Cir. 1985)	9
United Paperworkers International Union v. Champion International Corp., 908 F.2d 1252 (5th Cir. 1990)	8, 12
Statutes	
Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.*	3, 12

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The plaintiffs are a class of retired hourly employees from the Wheelabrator plant in Mishawaka, Indiana, their spouses and the surviving spouses of their deceased fellow retirees. The retirees were members of bargaining units represented by the UAW and its Locals 995 and 5, which negotiated a series of collective bargaining agreements with Wheelabrator. The last of these agreements expired in 1988, shortly after Wheelabrator closed its Mishawaka plant. Wheelabrator continues to operate at other facilities.

Since 1965, the collective bargaining agreements have provided for the payment of health insurance premiums under the following language:

> Those employees who have retired since September 22, 1959 will have the full cost of their Blue Cross-Blue Shield coverage paid by the Company after they attain 65 years of age . . . (Pet. A46)

Subsequent negotiations provided that "benefits shall be continued for the spouse after the death of the retiree." (Pet. A47)

No separate formal plan was prepared or distributed by the employer, apart from the collective bargaining agreements. The employer provided the employees with a summary plan description ("SPD") describing the benefits to be provided. The SPD contained no language indicating that the plan had a termination date or that it was subject to modification or termination by the employer.[1]

Two months after the retiree insurance agreement was first negotiated in 1965, the employer in a letter to retirees stated that "Effective on July 1, 1966, and thereafter during your lifetime, the Company will continue to pay the full cost of your Blue Cross-Blue Shield premium." (Pet. A46) For twenty-three years after these benefits were negotiated, the employer gave every retiring employee a document entitled "Your Benefits As A Union Retiree Of Wheelabrator-Frye Inc." which stated under the subtitle Medical Insurance: "Both you and your spouse will be covered for the remainder of your lives." (Pet. A47)

Both union and employer representatives who were responsible for the negotiation and/or administration of these provisions from 1965 to 1985 stated in their depositions that these benefits were intended to last "forever, as long as they [retirees and spouses] live." In written correspondence to surviving spouses as late as 1987, the company wrote: "Your medical coverage will continue

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[1] In fact, no termination or modificaiton language was included in any SPD prepared by the company until 1989, shortly after the company had announced its intention to unilaterally reduce retiree benefits.

for your lifetime, with no changes in the type of benefits you had previously."

In collective bargaining agreements since 1965, the company and union negotiated additional medical benefits for retirees, including major medical, dental, vision, hearing and prescription drug coverage. These provisions were negotiated separately for retirees and went into effect at different times for retirees than for active employees. The 1981 agreement provided expressly that the company's Blue Cross-Blue Shield coverage will provide "Dental, Vision and Hearing for all Retirees." The 1985 agreement significantly modified the health insurance plan for active employees and future retirees, but the coverage for existing retirees, under what was now termed "Plan 1," remained unchanged.

In 1988, Wheelabrator closed its Mishawaka plant and the last negotiated collective bargaining agreements expired. In February, 1989, Wheelabrator informed retirees that, effective on March 1, 1989, their insurance benefits were being changed to significantly reduce benefits and increase retiree costs.

The retirees filed a class action in federal court for breach of the collective bargaining agreements which created their rights to medical benefits after retirement. The retirees also alleged parallel violations of the Employee Retirement Income Security Act ("ERISA"), based on the employer's violation of the terms of the benefit plan embodied in the applicable labor agreements.

The district court granted the employer's motion for summary judgment and dismissed the case. The district judge held that the language of the agreement did not provide for the continuation of retiree benefits after expiration of the last collective bargaining agreement and, therefore, the employer had no continuing duty to provide retiree benefits at any level. The district court considered only language in the collective bargaining agreements and in insurance contracts negotiated betwen the employer and

private insurers. The court refused to consider any other evidence of the parties' intent in order to determine the scope and duration of the contractual provisions governing retiree insurance.

The Seventh Circuit *en banc* reversed the district court. The issue on appeal, in the court's view, was whether the district court was correct in refusing to consider the "extrinsic" evidence offered by retirees "even though some contractual language and a great deal of 'extrinsic' evidence . . . suggest that the parties may have intended to confer vested rights on the retired employees." (Pet. A3) The Seventh Circuit concluded that the contractual language was sufficiently ambiguous that consideration of extrinsic evidence was required to determine the imperfectly expressed intent of the parties, and therefore remanded the case to the district court for further proceedings.

The court also rejected the employer's contention that the collective bargaining agreement unambiguously establishes that the benefits, even if vested, could be reduced to the level provided for active employees at other locations. The court found that the contractual language supported competing interpretations of the agreement on the issue of the level of benefits to which retirees may be entitled. Accordingly, summary judgment for the employer was reversed and the case was remanded to the district court for consideration of additional evidence on this issue as well.

REASONS FOR DENYING THE WRIT

I. THE SEVENTH CIRCUIT'S DECISION IS NOT IN CONFLICT WITH THE SUPREME COURT'S DECISION IN *LITTON FINANCIAL PRINTING DIVISION v. NLRB*

The issue presented for review here is an extremely narrow one: when a labor agreement is ambiguous regarding the intended duration of retiree health benefits, should courts allow the introduction of "extrinsic" evidence bear-

ing on that question of contract interpretation. The court below found that the intent of the parties was not unambiguously discernible from the language of the contract itself and therefore remanded the case in order to allow presentation of additional evidence regarding the intent of the parties. As Judge Posner's decision stated:

> The contract in this case is ambiguous and both sides are poised to present testimony and documents that they claim will disambiguate it. We think they should be allowed to do so . . . (Pet. A14)

The court therefore remanded the case to the district court for consideration of additional evidence bearing on the patries' intent. The Seventh Circuit neither rendered a contract interpretation decision nor suggested to the district court any particular method for doing so. Instead, the Seventh Circuit merely determined that the parties should be allowed to introduce extrinsic evidence in support of their interpretations and remanded the case to the district court for further evidentiary proceedings. The only issue presented for review at this stage in the proceedings, therefore, is whether contractual ambiguities should be resolved after review of such evidence.

1. Since Petitioner spends most of its time arguing that the Seventh Circuit decision conflicts with *Litton Financial Printing Division v. NLRB*, —— U.S. ——, 111 S.Ct. 2215, 115 L.Ed.2d 177 (1991), we will address that argument first.

The *Litton* decision does not address in any way the question presented here. The Court in *Litton* was not presented with a question of whether to allow consideration of "extrinsic" evidence bearing on the intent of parties to a labor agreement. Instead, the parties in the *Litton* case were apparently allowed to introduce whatever evidence they wished; there is no discussion regarding the scope of permitted evidence in that decision at all.

2. Nor does the *Litton* decision announce any principle of contract interpretation that conflicts with the Seventh Circuit's decision to allow introduction of extrinsic evidence here.

In *Litton* the Court considered the issue whether and in what circumstances a duty to arbitrate grievances survives expiration of a collective bargaining agreement. The Court determined that the duty will generally surive as to rights which "arise under" the expired agreement. A right will be held to "arise under" an expired agreement, according to the Court, if, *inter alia*, that right "accrued or vested under the [expired] agreement, or where, under normal principles of contract interpretation, the . . . right survives expiration of the contract." 111 S.Ct. at 2225.

As the decision in *Litton* recognizes, therefore, the parties to collective bargaining agreements may provide for rights that extend beyond the term of any particular contract. And, while the Court there determined that the seniority rights at issue involved neither a vested right nor one which could be read to survive the contract's expiration, the Court stated that "normal principles of contract interpretation" should continue to guide courts in determining whether the parties have intended that a particular contractual benefit "survives expiration of the remainder of the agreement." 111 S.Ct. at 2226.

This is precisely the analysis followed by the Seventh Circuit in this case. The court recognized that *Litton* prescribed both a rule that obligations do not ordinarily survive the expiration of a collective bargaining agreement and an exception for accrued or vested rights which "as a general matter" do outlive the agreement. (Pet. A7 quoting *Litton*, 111 S.Ct. at 2226.) The task for the district court on remand will be to determine whether the retiree benefits at issue here are subject to the rule or to the exception.

The court determined that the district court's grant of summary judgment should be reversed by looking initially

at the contractual language. It found some language to support a determination that the benefits provided to retirees and their surviving spouses were intended to last for the rest of their lives. While the language in favor of the retirees was not conclusive, the court found it sufficient in the context of the agreement as a whole to create an issue of interpretation which must be resolved after consideration of extrinsic evidence.

The Seventh Circuit Court's decision is nothing more than a remand to the lower court for consideration of all available evidence of the intent of the parties. This determination is entirely consistent with *Litton* and is therefore not worthy of review.

3. Petitioner is also entirely incorrect in arguing that *Litton* stands for the proposition that entitlements do not survive contract expiration absent explicit language to the contrary. As the *Litton* Court stated:

> [C]ontractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement. *Exceptions are determined by contract interpretation. Rights which accrued or vested under the agreement will, as a general matter, survive termination of the agreement.* And of course, if a collective bargaining agreement provides in explicit terms that certain benefits continue after the agreement's expiration, disputes as to such continuing benefits may be found to arise under the agreement . . . [111 S.Ct. 2226, emphasis added]

Thus, the *Litton* Court explicitly recognized that rights will survive contract expiration, *either* when such rights are "accrued or vested" under the contract *or* when the parties have designated those rights for survival. *Litton* further instructs the courts to apply "normal principles of contract interpretation" to determine whether rights created by a labor agreement have vested or accrued or have otherwise been designated by the parties to survive contract expiration.

The Seventh Circuit determined only that "normal principles of contract interpretation" here require consideration of all available evidence to resolve the contractual ambiguity and therefore remanded the case to the district court for further proceedings. That determination in no way conflicts with *Litton* or any other decision of this Court.

II. THE SEVENTH CIRCUIT'S DECISION IS NOT IN CONFLICT WITH THE DECISION OF ANY OTHER CIRCUIT

1. As already described, the only issue presented for review here is whether the Seventh Circuit was incorrect in remanding this case for introduction of additional evidence bearing on the intent of the parties to the labor agreement containing ambiguous language regarding the duration of retiree health insurance benefits. Thus, the Seventh Circuit's decision is limited to a determination that the parties should be "allowed" to "present testimony and documents" in support of their efforts to resolve a contractual ambiguity. (Pet. A14).

This proposition—that contractual ambiguities should be resolved after review of all available evidence of the intent of the contracting parties—is entirely unremarkable and has been unanimously accepted by the circuits that have considered the issue.[2] Neither petitioner nor the

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[2] E.g. Fifth Circuit: *United Paperworkers International Union v. Champion International Corporation*, 908 F.2d 1252, 1256 (5th Cir. 1990) ("If the court finds the contract to be ambiguous, the determination of the parties intent becomes a question of fact, and extrinsic evidence of intent may be introduced."); Sixth Circuit: *Smith v. ABS Industries, Inc.*, 890 F.2d 841, 846 n.1 (6th Cir. 1989) ("[E]xtrinsic evidence may be properly introduced to resolve [contractual] ambiguit[ies]," citing *UAW v. Yard-Man, Inc.*, 716 F.2d 1476, 1480 (6th Cir. 1983) *cert. denied* 465 U.S. 1007 (1984); Eighth Circuit: *Anderson v. Alpha Portland Industries, Inc.*, 836 F.2d 1512, 1517 (8th Cir. 1988) *cert. denied sub nom, Anderson v. Shattery Group, Inc.*, 489 U.S. 1051 (1989) ("[I]f the contract is

Amicus in its support have been able to cite a single case from any circuit which holds otherwise.[3] Neither Petitioner nor the Amicus has been able to demonstrate that any other circuit court would have reached a different result in this case.

2. Petitioner asserts generally that the circuits are in conflict in their approach to interpretation of collective bargaining agreements in this area, citing the dissent in the decision below. (Pet. 25-26) The different results reached in the cases cited in that passage from the dissent, however, reflect nothing more than the variety of factual circumstances in which the lower courts have been asked to intercede. It is certainly not surprising that employers have prevailed in some retiree insurance disputes while retirees have prevailed in others. But that lack of unanimity of result reflects only the variety of contractual provisions and factual circumstances addressed by the courts below.

The range of decisions of various courts interpreting retiree insurance provisions indicates that the inquiry is particularly fact sensitive. This is demonstrated by comparing the decision below with previous decisions in the same court. In *Senn v. United Dominion Industries, Inc.*,

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deemed ambiguous, then the court may weigh extrinsic circumstances to aid in its construction," quoting *UFCW Local 105-A v. Dubuque Packing Co.*, 756 F.2d 66, 69 (8th Cir. 1985).

[3] Amicus American Automobile Manufacturers Association ("AAMA") indicates that it prefers the "rule previously adopted by the Seventh Circuit in *Senn v. United Dominion Industries, Inc.*, 951 F.2d 806, 816 (7th Cir. 1992), *cert. denied*, 61 U.S.L.W. 3851 (June 21, 1993)." (AAMA Brief at 10). To the extent that the *Senn* panel endorsed a "rule" which is in conflict with the reasoning of this case, of course, any such "rule" was short-lived and has now been overruled by the Seventh Circuit's *en banc* decision here. And, as stated in text, no other circuit has announced any "rule" under which extrinsic evidence is not available to resolve contractual ambiguities.

951 F.2d 806 (7th Cir. 1992), *cert. denied* 61 U.S.L.W. 3848, (June 21, 1993), the court found that the language of a collective bargaining agreement unambiguously failed to provide for lifetime benefits where the retiree insurance provision stated merely that the company "will continue for retirees" the benefits provided in the agreement. In its decision below, the Seventh Circuit distinguished its prior decision in *Senn* on the grounds that the language in support of the retirees' claim was weaker in *Senn* and that other contextual evidence indicated an intent to limit the duration of the benefits in that case.

In *Ryan v. Chromalloy American Corp.*, 877 F.2d 598 (7th Cir. 1989), the Seventh Circuit also found the contractual language unambiguous. In *Ryan*, language incorporated by reference in the collective bargaining agreement provided an express right to terminate the retiree insurance benefits. The court found no conflicting language in the agreement to support a claim that the benefits vested in spite of this reserved right.

These differences in result, we believe, are entirely attributable to differences in contractual language and other factors properly considered by the lower courts. To the extent that the circuits have adopted different interpretive approaches or methodologies regarding the question which will be presented ultimately in this case—whether the retiree benefits are vested—that question is not presented by this case in its present posture. For, as described above, the only question decided by the Seventh Circuit at this stage is whether extrinsic evidence should be admissible in order to resolve contractual ambiguities. And, as also described above, no circuit has disagreed with the Seventh Circuit's conclusion that extrinsic evidence should be available to assist courts in that context.

If, following the remand, the court below in fact interprets the labor agreement at issue here by a method different than that adopted in other circuits, either party will

have the opportunity at that time to seek review by this Court. At this point, however, there is no reason to believe that will be the result. All that has occurred to date is that the court below has joined the other circuits and determined that all available evidence should be made available to the tribunal charged with resolving a contractual ambiguity.

3. In fact, the interlocutory nature of the decision of the Seventh Circuit provides an independent basis on which the Petition should be denied here. This Court has long disfavored the grant of *certiorari* with respect to interlocutory decisions. *American Construction Co. v. Jacksonville T. & K.R. Co.*, 148 U.S. 372, 384 (1893); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (*certiorari* should be granted as to interlocutory decisions only in "extraordinary" cases).

There is nothing "extraordinary" about the present situation, and there is no reason that the employer here needs interlocutory review to avoid undue hardship. The Seventh Circuit decision is merely the equivalent of a denial of summary judgment by the district court. If the Seventh Circuit's decision is allowed to stand, the case will be remanded to the district court where both the employer and the retirees will have a full opportunity to present evidence in support of their reading of the labor agreement. Based on that evidence, a contract interpretation decision will be rendered, which either party will be able to appeal further. In short, this case presents a textbook example of why interlocutory review is not necessary.

III. THE SEVENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH ANY IMPORTANT FEDERAL POLICY

Petitioner and its supporting Amicus argue that crucial issues of national economic importance are at stake in this case. But, as described above, the only issue decided

by the court below was whether and in what circumstances extrinsic evidence can be used to shed light on ambiguous language in a labor agreement. The court's conclusion that consideration of extrinsic evidence is proper in this case because the contract language is not clear is nothing more than hornbook contract law. There is no issue of national significance implicated in this decision.

Contrary to Petitioner's claim, the Seventh Circuit's decision presents no threat to the provisions or policies of ERISA. As Petitioner recognizes, ERISA does not require welfare benefits to vest as a matter of law but permits them to vest by agreement of the parties. *See Ryan v. Chromalloy American Corp.*, 877 F.2d 598 (7th Cir. 1989). There is nothing in the language or policy of ERISA that expresses a preference for or against vesting of these benefits by agreement. *United Paperworkers International Union v. Champion International Corp.*, 908 F.2d 1252, 1256 (5th Cir. 1990). The Seventh Circuit decision in this case is merely a step in the process of determining the nature of the parties' agreement on the issue of vesting so that the agreement, whatever it is, can be enforced. The decision is entirely neutral on the issue of vesting of welfare benefits, and this neutrality is entirely consistent with ERISA.

Nor does the Seventh Circuit's decision undermine ERISA's requirement that benefit plans be set forth in writing. The retiree insurance plan in this case is contained in a written collective bargaining agreement. The Seventh Circuit's decision is not an attempt to enforce free-floating oral promises or to undermine the written agreement. Instead, it merely instructs the district court to determine the meaning of the written language in a manner consistent with the intent of the contracting parties. Consistent with basic rules of contract construction, the Seventh Circuit requires consideration of extrinsic evi-

dence in this case only because the written language is ambiguous.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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